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.*

and

SHERIFF BRAD COE IN HIS OFFICIAL CAPACITY AND KINNEY COUNTY, TEXAS; SHERIFF J.W. GUTHRIE IN HIS OFFICIAL CAPACITY AND EDWARDS COUNTY, TEXAS; SHERIFF EMMETT SHELTON IN HIS OFFICIAL CAPACITY AND MCMULLEN COUNTY, TEXAS; SHERIFF ARVIN WEST IN HIS OFFICIAL CAPACITY AND HUDSPETH COUNTY, TEXAS; SHERIFF LARRY BUSBY IN HIS OFFICIAL CAPACITY AND LIVE OAK COUNTY, TEXAS; SHERIFF NATHAN JOHNSON IN HIS OFFICIAL CAPACITY AND REAL COUNTY, TEXAS; GALVESTON COUNTY, TEXAS; THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION,
*Movants.*

**On Writ of Certiorari before Judgment to the United States Court of Appeals for the Fifth Circuit**

## MOTION OF SHERIFF BRAD COE ET AL. FOR LEAVE TO INTERVENE AS RESPONDENTS


KRIS W. KOBACH
Kobach Law, LLC
P.O. Box 155
Lecompton, KS 66050
(913) 638-5567
kkobach@gmail.com

CHRISTOPHER J. HAJEC
*Counsel of Record*
MATT A. CRAPO
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org
*Counsel for Movants*

## PARTIES TO THE PROCEEDINGS

Petitioners—defendants-appellants below—are the United States of America; the U.S. Department of Homeland Security ("DHS"); U.S. Customs and Border Protection ("CBP"); U.S. Immigration and Customs Enforcement ("ICE"); U.S. Citizenship and Immigration Services ("USCIS"); Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; Chris Magnus, in his official capacity as Commissioner of CBP; Tae D. Johnson, in his official capacity as Acting Director of ICE; and Ur Jaddou, in her official capacity as Director of USCIS.

Respondents—plaintiffs-appellees below—are the State of Texas and the State of Louisiana.

Movants—plaintiffs in *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex.)—are Kinney County, Texas, and Kinney County Sheriff Brad Coe in his official capacity; Edwards County, Texas, and Edwards County Sheriff J. W. Guthrie in his official capacity; McMullen County, Texas, and McMullen County Sheriff Emmett Shelton in his official capacity; Hudspeth County, Texas, and Hudspeth County Sheriff Arvin West in his official capacity; Live Oak County, Texas, and Live Oak County Sheriff Larry Busby in his official capacity; Real County, Texas, and Real County Sheriff Nathan Johnson in his official capacity; Galveston County, Texas; and the Federal Police Foundation, ICE Officers Division.

## RULE 29.6 STATEMENT

Movant Federal Police Foundation, ICE Officers Division, has no parent company, and no publicly held company owns 10 percent or more of its stock. The other movants are Texas officials and counties, with no parent companies or stock.

## RELATED PROCEEDINGS

The following proceedings relate directly to this action for purposes of this Court's Rule 14.1(b)(iii):

- *Texas v. United States*, No. 6:21-cv-16-DBT (S.D. Tex.). Filed April 6, 2021; motion to be consolidated with *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex.), denied July 12, 2021; judgment entered June 10, 2022; stay pending appeal denied June 14, 2022.

- *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex.). Filed July 1, 2021; preliminary injunction denied February 21, 2022; motion for reconsideration of the denial of a preliminary injunction pending; stayed pending the resolution of this action July 14, 2022.

- *Texas v. United States*, No. 21-40618 (5th Cir.). Filed August 23, 2021; appellants' unopposed motion to dismiss granted February 11, 2022.

- *Texas v. United States*, No. 22-40367 (5th Cir.). Filed June 13, 2022; stay pending appeal denied, July 6, 2022; briefing suspended July 28, 2022.

- *United States v. Texas*, No. 22A17 (U.S.). Stay application filed July 8, 2022; application denied July 21, 2022.

## TABLE OF CONTENTS

**APPENDIX**

## TABLE OF AUTHORITIES

**CASES**

**CONSTITUTION AND STATUTES**

**RULES**



**OTHER AUTHORITIES**

**MOTION TO INTERVENE**

Pursuant to this Court's Rule 21, six Texas county sheriffs, their respective counties, an additional Texas county (collectively, the "Texas County Movants"), and the Federal Police Foundation, ICE Officers Division ("FPF" and, with the Texas County Movants, collectively "Movants") respectfully move to intervene in the above-captioned action for the purpose of seeking injunctive relief on the claims in this case. Movants are plaintiffs in *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex. filed July 1, 2021), an action similar to this action. (The main difference between *Coe* and this action is that in *Coe*, Movants challenge petitioners' policies under 8 U.S.C. § 1225, alleging both facial violations and an unwritten, unlawful policy, as well as their policies under 8 U.S.C. §§ 1226 and 1231.)

Under 8 U.S.C. § 1252(f)(1), as construed in *Biden v. Texas*, 142 S. Ct. 2528, 2539 (2022), this Court has discretion to hear and rule on requests for injunctive relief in a case such as this, a responsibility that is only heightened because no other federal court has that power. Here, intervention is warranted because only injunctive relief can fully redress Movants' injuries and protect their rights; because, even though the record justifying injunctive relief was fully developed below, respondents do not seek injunctive relief if they can obtain *vacatur* in this Court, and therefore do not adequately represent Movants' interests; and because, absent intervention, Movants cannot seek injunctive relief without excessive delay, nor this Court grant it without

wasteful duplication. Granting this motion will not complicate this important case, and apparently is the only means to afford meaningful relief to respondents and Movants alike.

## PROCEDURAL BACKGROUND

1. On January 20, 2021, the first day of a new presidential administration, the Acting Secretary of Homeland Security issued a memorandum ordering a review of "policies and practices concerning immigration enforcement." Over the ensuing months, the Department of Homeland Security ("DHS") and its constituent agencies issued a series of memoranda purporting to set immigration enforcement "priorities" in light of a claimed lack of resources, and included in these "priorities" a massive executive amnesty in the form of a directive that *no* enforcement actions be commenced against a very large class of illegal aliens made removable by statute. *See* J.A. 112 (proclaiming that "[t]he fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them").

2. In this action, the State of Texas and the State of Louisiana challenge the memoranda as violating 8 U.S.C. §§ 1226(c) and 1231(a), and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"). *Texas v. United States*, No. 6:21-cv-16-DBT (S.D. Tex. filed Apr. 6, 2021). In *Coe*, Movants challenge the same agency action under 8 U.S.C. §§ 1226 and 1231 and the APA, as well as under 8 U.S.C. § 1225. *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex. filed July 1, 2021). In light of these later,

additional bases, which included factual allegations about defendants' unwritten policies, on July 26, 2021, the district judge denied a motion to consolidate *Coe* with this action. Order (July 26, 2021), *Texas v. United States*, No. 6:21-cv-16-DBT (S.D. Tex.) (App. 153a-168a).

3. On February 21, 2022, the district court denied the *Coe* plaintiffs' motion for a preliminary injunction, based on the pendency of this action. Order (Feb. 21, 2022), *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex.) (App. 151a-152a). On February 22, 2022, the *Coe* plaintiffs moved to reconsider the denial of a preliminary injunction, which motion still is pending.

4. On June 10, 2022, the district court in this case vacated the challenged memoranda. *Texas v. United States*, 2022 U.S. Dist. LEXIS 104521 (S.D. Tex. June 10, 2022) (No. 6:21-cv-16-DBT) (J.A. 289-403). After unsuccessfully seeking a stay in the lower courts, on July 8, 2022, petitioners applied to this Court to stay the district court's judgment pending appeal and, in the alternative, to consider the stay application a petition for a writ of *certiorari* before judgment. *United States v. Texas*, No. 22A17 (U.S.).

5. On July 14, 2022, the district court in *Coe* stayed that case based on the pendency of this appeal. Minute Entry, (July 14, 2022), *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex. July 14, 2022).

6. On July 21, 2022, this Court denied the stay application and granted the alternate petition for a writ of *certiorari* before judgment on three questions: (a) whether respondents have Article III standing,

(b) whether the challenged memoranda are contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a) or otherwise violate the APA[1], and (c) whether § 1252(f)(1) prevents the entry of an order to "hold unlawful and set aside" the memoranda under the APA. *United States v. Texas*, __ S. Ct. __, 91 U.S.L.W. 3013 (U.S. July 21, 2022) (No. 22A17).

## SUMMARY OF ARGUMENT

Movants move to intervene for the purpose of seeking permanent injunctive relief in this Court. This motion should be granted because it presents the Court with an appropriate occasion to consider exercising its unique power to grant injunctions in a case covered by its ruling in *Biden*.

Absent intervention, Movants will be precluded from obtaining adequate or meaningful relief. Movants seek an injunction barring petitioners from adopting enforcement policies that gratuitously frustrate, and at times outright annul, statutory enforcement provisions. Even if this Court were to uphold the district court's judgment vacating the Secretary's final memorandum codifying petitioners' unlawful conduct, *vacatur* under the APA will not fully remedy Movants' injuries. Petitioners would remain free to proceed with the same or similar non-

[1] It would appear fairly included in this question presented whether the memoranda are contrary to law not just because they violate 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a) but because they "otherwise" violate the APA's contrary-to-law provision.

enforcement practices on an *ad hoc* basis in the future, and *vacatur* does not ensure future compliance with statutory immigration law enforcement provisions. Neither will a declaratory judgment, which petitioners will be free to ignore, provide Movants meaningful relief.

With their *Coe* case stayed until this Court resolves this case, Movants have no alternative avenue to seek meaningful relief in any reasonable period of time. Even when the stay in *Coe* eventually is lifted, Movants will have, at best, a protracted and uncertain path forward. If they appeal a denial of their motion for a preliminary injunction, their petitioning for *certiorari* before judgment would only present this Court with the opportunity to grant preliminary injunctive relief, and then return the case to lower courts that would be powerless to make that injunction permanent, and the final judgment of which would ordinarily dissolve that preliminary injunction. Alternatively, if Movants proceed to trial or summary judgment, and then petition for *certiorari* before judgment on the denial of a permanent injunction, that course may (or may not) present this Court with the opportunity at last to grant injunctive relief—but only after a lengthy and wastefully-duplicative process that can be avoided if intervention is allowed now. After that process, moreover, so much time will have elapsed that justice will simply be denied through delay.

Respondents did not appeal the denial of injunctive relief either below or in this Court, and this Court did not grant *certiorari* on the question of

whether to issue injunctive relief. In their brief in this Court, respondents seek injunctive relief only on the condition that *vacatur* is unavailable, even in this Court, under the APA. Otherwise, respondents seek *vacatur* rather than injunctive relief.

Thus, respondents do not adequately represent Movants' interests in obtaining injunctive relief in addition to any *vacatur*. Also, apparently, respondents are simply unable to represent Movants' interests adequately here, because injunctive relief was not pressed or passed on in the court of appeals, and is not included in the questions presented here. Whether respondents actually are so unable or not, this motion could serve as an opportunity for the Court to indicate generally how parties might go about seeking injunctive relief from this Court in cases, such as *Coe* and this one, in which lower courts are barred from issuing such relief.

Movants have standing to seek additional relief in this Court. The Texas County Movants have standing based on the costs they accrue in detaining additional criminal aliens and illegal aliens at large because of the memoranda. FPF has standing based on its diverted-resources injury under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), due to its need to advise members of the lawfulness and repercussions of members' actions in the wake of the memoranda. FPF similarly has associational standing based on the dilemma presented to its members of violating either their employer's *ultra vires* agency action or federal statutes and their oaths of office. Because Movants suffer these concrete injuries, their

APA procedural injury lowers the Article III thresholds for immediacy and redressability. Accordingly, the Court should grant Movants' motion to intervene to seek injunctive relief enjoining the policies in the memoranda and directing petitioners to comply with the statutory enforcement provisions at issue in this case.

## ARGUMENT

### I. THIS COURT SHOULD ALLOW MOVANTS TO INTERVENE.

Whether under this Court's inherent authority or by analogy to Federal Rule of Civil Procedure 24, intervention is warranted because Movants' rights will be affected by the outcome of this case and other parties to the case are not likely to represent Movants' interests adequately. An appellate court's power to allow intervention does not derive from a statute or rule. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2022). While the federal rules for district court intervention apply by analogy, *id.* at 1010-12, the rules for district courts do not—and could not—limit this Court's "inherent authority … in the orderly administration of justice." *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 74 (1927); *Hutto v. Finney,* 437 U.S. 678, 696 (1978); *Rea v. United States,* 350 U.S. 214, 217 (1956); *Sibbach v. Wilson & Co.,* 312

U.S. 1, 10 (1941). Both that inherent authority and—by analogy—Rule 24 support Movants' intervention.[2]

### A. Intervention is necessary to protect Movants' interests.

This Court has allowed post-*certiorari* intervention when the case before the Court would affect the movant's rights. Appellate intervention often involves allowing a real party in interest to intervene.[3] But appellate intervention is not limited to real parties in interest and can extend to any party that would be affected by a case before the appellate court. *Eastern-Central Motor Carriers Ass'n v. United States,* 321 U.S. 194, 198-99 n.5 (1944) (allowing intervention to an entity that participated before the agency, but did not receive notice of the lower-court proceedings); *United States v. Terminal Railroad*

---

[2] FED. R. CIV. P. 24 sets out the criteria for intervention into district court proceedings, both as of right and permissively. Rule 24(c) requires that motions to intervene be accompanied by a pleading that sets out the claim or defense for which intervention is sought. FED. R. CIV. P. 24(c). The Appendix includes Movants' operative complaint from their *Coe* action in district court. App. 1a-59a.

[3] For example, in *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967), the Court allowed a widow to intervene into the appeal to this Court of an employer's challenge to a Department of Labor proceeding involving her husband's death. *Compare Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) *with Chicago Grain Trimmers Ass'n. v. Enos*, 369 F.2d 344 (7th Cir. 1966); *see also N.L.R.B. v. Acme Industrial Co.,* 384 U.S. 925 (1966) (allowing the affected labor union to intervene in an unfair-labor-practice matter between the National Labor Relations Board and an employer).

*Ass'n*, 236 U.S. 194, 199 (1915) ("[A]lthough the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights"); 28 U.S.C. § 2106 ("Supreme Court or any other court of appellate jurisdiction … may … require such further proceedings to be had as may be just under the circumstances"). This action will not only affect Movants' rights, but presents the only opportunity for Movants to seek meaningful relief. Because intervention here is the only way for Movants to obtain injunctive relief in a timely manner, this Court—the only tribunal empowered by Congress to grant such relief—should permit Movants to intervene.[4]

---

[4] Movants have acted expeditiously. At the outset, by filing an independent action that addresses not only the federal misconduct at issue here but also misconduct under 8 U.S.C. § 1225, Movants acted to protect their rights, and the federal petitioners—as defendants in *Coe*—were on notice of that dispute. Until this Court decided *Biden* on June 30, 2022, Fifth Circuit precedent had rejected the suggestion that the federal petitioners could rely on § 1252(f)(1) to shield abdication of the INA's enforcement obligations. *Texas v. Biden*, 20 F.4th 928, 1003-04 (5th Cir. 2021), *rev'd* 142 S. Ct. 2528 (2022); *see also Grace v. Barr*, 965 F.3d 883, 906-07 (D.C. Cir. 2020) (distinguishing between operation of the statutory provisions themselves and unlawful agency action). Indeed, as Justice Barrett observed, *Biden* "embraces a theory of §1252(f)(1) that … no court of appeals has ever adopted." 142 S. Ct. at 2560 (Barrett, J. dissenting). By acting quickly after the sea change in controlling authority, and learning that respondents, in their brief in this Court, take a position that does not adequately represent Movants' interests in seeking injunctive relief, Movants have acted diligently under the circumstances.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009-546, which mandated the detention of certain criminal aliens and provided for the detention and expedited removal of certain inadmissible aliens. *See Demore v. Kim*, 538 U.S. 510, 518-20 (2003) (discussing the mandatory detention of criminal aliens under IIRIRA); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963-66 (2020) (discussing IIRIRA's expedited removal and detention scheme); *see also Zadvydas v. Davis*, 533 U.S. 678, 683 (2001) ("After entry of a final removal order and during the 90-day removal period, however, aliens must be held in custody.") (citing 8 U.S.C. § 1231(a)(2)); *id.* at 697-98 (discussing statutory history of § 1231).

In contravention of such congressional directives, the Secretary's final memorandum boldly rewrites the nation's immigration laws, changing statutory enforcement directives not only into discretionary actions, but into discretionary actions that may only be taken after consideration of non-statutory factors. Where Congress directs that some enforcement action "shall" be taken, the Secretary has instructed DHS officers that they "may not" take such action before weighing non-statutory aggravating and mitigating circumstances and concluding that such circumstances are sufficient to warrant action. For instance, although § 1226(c)(1) makes detention mandatory based solely on the fact of conviction of certain crimes, the Secretary of DHS instructs that agency "personnel should not rely on the fact of conviction or the result of a database search alone."

J.A. 115. "Rather, [DHS] personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue." *Id.* As the district court concluded, "[t]he Final Memorandum supplants Congress's clear commands with an extra-statutory balancing scheme of aggravating and mitigating factors that agency personnel must apply." 2022 U.S. Dist. LEXIS 104521, at *85.

In an even starker overwrite of the statutes, the Secretary's final memorandum proclaims that "[t]he fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them." J.A. 112. Thus, under the final guidelines, every alien defined as *removable* by Congress who is "merely" a removable alien—that is, an alien regarding whom there are no known non-statutory aggravating circumstances—is made not merely a low priority for removal, or even a subject of deferred action, but actually *unremovable* by this executive rulemaking. Thus, that rulemaking is directly contrary to statute.

Only injunctive relief can cure this stark violation, and the other unlawful policies in the memoranda at issue. Though *vacatur* would redress respondents' and Movants' injuries to a limited extent by voiding the memoranda, it would leave petitioners free to create similar policies, or follow the same ones on an *ad hoc* basis. As the Fifth Circuit observed below in denying a stay of the district court's judgment,

"vacatur does nothing but re-establish the status quo absent the unlawful agency action. Apart from the constitutional or statutory basis on which the court invalidated an agency action, vacatur neither compels nor restrains further agency decision-making." *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022). Thus, with *vacatur*, petitioners are free to fashion enforcement guidelines anew on remand that may not be in accordance with statutory enforcement directives, and also free to direct agents through back channels to go on following the policies in the vacated memoranda.

Similarly, a declaration that petitioners are violating their statutory duties would not compel compliance with the law. "[E]ven though a declaratory judgment has the force and effect of a final judgment, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (interior quotation marks and citations omitted). As construed by this Court in *Biden*, therefore, § 1252(f)(1) frees the federal executive from any strong judicial oversight for failing to enforce a large portion of the Immigration and Nationality Act ("INA"), at least until a plaintiff manages to obtain this Court's discretionary review and obtains injunctive relief.

### B. Absent intervention, Movants' injuries may never be redressed.

Movants allege injuries resulting from the same agency action challenged in this litigation and have had their litigation stayed pending resolution of this appeal. With a motion for a preliminary injunction denied (and reconsideration pending), plus no likelihood of final relief in the district court until well after this Court's decision in this case, a remedy for Movants injuries is not yet on the horizon.

Movants have no alternative avenue to seek meaningful relief in any reasonable period of time. Even after the stay in *Coe* eventually is lifted, Movants will have, at best, a protracted and uncertain path forward, especially if this Court does not clarify the process for a plaintiff to obtain review in this Court, where—at last—the plaintiff can seek injunctive relief. For example, does the plaintiff need to seek injunctive relief below, knowing that § 1252(f)(1) makes that relief unavailable? *See United States v. Williams*, 504 U.S. 36, 41 (1992) (stating that this Court considers only "question[s] … pressed or passed upon below"). Similarly, can a plaintiff seek a preliminary injunction via an interlocutory appeal to this Court, knowing that this Court's preliminary injunction could be mooted by the district court's eventual entry of a final judgment? *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1999) ("[A]ppeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter"). A district court

may lack jurisdiction or authority under § 1252(f)(1) to merge this Court's preliminary injunction with the district court's final judgment.

Alternatively, if Movants proceed to trial or summary judgment, and then petition for *certiorari* before judgment on the denial of a permanent injunction, that course may (or may not) present this Court with the opportunity at last to grant injunctive relief—but only after a lengthy and wastefully-duplicative process that can be avoided if intervention is allowed now. Here, respondents have developed a record following a full trial on the merits sufficient for this Court to rule on Movants' request for injunctive relief. Absent intervention, Movants will be forced to restart essentially from scratch in the district court, presumably circa June 2023, to pursue the same merits issues presented here, with no ability to seek injunctive relief until the district court grants or denies non-injunctive relief, 8 U.S.C. § 1252(f)(1); *Biden*, 142 S. Ct. at 2539, and an appeal reaches this Court. Given that Movants' injuries are irreparable, justice delayed is justice denied. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (discussing "the danger of denying justice by delay"); *Magna Carta*, 17 John, ch. 40 (1215), *translated and reprinted in* BOYD C. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND 239 (2d ed. 1900) ("to none will we deny, to none will we delay right or justice"). *See also Mullaney v. Anderson,* 342 U.S. 415, 417 (1952) (allowing parties to be added to avoid the "needless waste" of requiring them "to start over in the District Court").

### C. Injunctive relief may not be available absent intervention.

In this case, the district court denied respondents' request for injunctive relief. J.A. 400-02. Respondents did not appeal that denial, and have not asked this Court to exercise its authority under 8 U.S.C. § 1252(f)(1) to grant injunctive relief except on the condition that *vacatur* is unavailable under the APA. Respondents' Brief at 47. Thus, respondents do not adequately represent Movants' interests in seeking injunctive relief in addition to any *vacatur*.

It would also appear that respondents are unable to do so. This Court has granted *certiorari* in this case to review three questions: (1) whether respondents have Article III standing to challenge DHS's enforcement guidelines; (2) whether those guidelines are contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a) or otherwise violate the APA; and (3) whether the lower courts have the authority under 8 U.S.C. § 1252(f)(1) to "hold unlawful and set aside" the guidelines under 5 U.S.C. § 706(2).

> The framing of the question[s] presented has significant consequences, however, because under this Court's Rule 14.1(a), "only the questions set forth in the petition, or fairly included therein, will be considered by the Court." While "the statement of any question presented will be deemed to comprise every subsidiary question fairly included therein," *ibid.*, we ordinarily do not consider questions

> outside those presented in the petition for certiorari.

*Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (additional citations omitted). In addition, this Court traditionally considers only "question[s] … pressed or passed upon below." *Williams*, 504 U.S. at 41. Thus, absent intervention by Movants, injunctive relief might not be available in this Court, the only tribunal authorized by Congress to grant such relief.

### D. Movant's have standing to pursue their claims.

Here, Movants challenge the same federal agency action as do the States, but seek the additional relief of an injunction. Meeting the requirement set forth in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), Movant's have standing to seek that additional relief.

To establish standing, a plaintiff must show that: (1) the challenged action constitutes an "injury in fact," (2) the injury is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision, and (3) nothing otherwise precludes judicial review. *Ass'n of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970). An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest, (2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992). For injuries directly caused by government action or inaction, a plaintiff can show

an injury in fact with "little question" of causation or redressability, but when the government causes third parties to inflict injury, the plaintiff must show more to establish causation and redressability. *Defenders of Wildlife,* 504 U.S. at 561-62. Membership organizations may establish standing either in their own right or on behalf of their members. *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). To secure merits relief, a membership organization must establish that either at least one identified member or the entire membership suffers injury. *Summers v. Earth Island Inst.,* 55 U.S. 488, 498-99 (2009).

"[O]nce a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006). Thus, a plaintiff can challenge a defendant's action for any unlawfulness, once the plaintiff establishes standing to challenge that action. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 78-81 (1978) (holding that standing doctrine has no nexus requirement outside taxpayer standing).

### 1. The Texas County Movants have standing.

The Texas County Movants suffer increased apprehension and detention costs resulting from petitioners' failure to comply with the detention

mandates in the INA. That is all that Article III requires.

The Texas County Movants' economic harms from illegal immigration easily qualify as cognizable injury under Article III. Indeed, any measurable "trifle" of injury suffices: "We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $ 5 fine and costs, and a $1.50 poll tax." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (citations omitted). The Texas County Movants clearly are suffering increased law-enforcement and detention costs from increased illegal immigration and decreased INA enforcement. *See* Coe Aff. ¶¶ 7-11; Coe Decl. (Oct. 2_, 2022) ¶¶ 9-13; Gurthrie Aff. ¶¶ 4-5, 7-10; Shelton Aff. ¶¶ 6-11, 13. Similarly, the Texas Movants are suffering increased public-safety injuries, *see* Coe Decl. ¶¶ 18, 21; Gurthrie Aff. ¶ 13; Shelton Aff. ¶ 12, as well as increased exposure to disease from which the INA should protect them. *See* 8 U.S.C. § 1182(a)(1)(A)(i); Gurthrie Aff. ¶ 18 (exposure to COVID-19). The Texas County Movants unquestionably are injured.

The Texas County Movants' injuries are both caused by and traceable to petitioners' unlawful actions and inaction. Because the petitioners' lax enforcement and non-enforcement contribute not only to more illegal aliens' coming here but also to their not being detained, causation and traceability are easily met: "Article III requires no more than *de facto* causality" and plaintiffs can thus "[meet] their burden

[by] showing that third parties will likely react in predictable ways …, even if they do so unlawfully." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (interior quotation marks omitted, emphasis in original). Common sense and the evidence both show that petitioners caused the Texas County Movants' injuries.

*First*, it is indisputable that INA enforcement has declined precipitously under the challenged memoranda. *See Texas v. United States*, 2022 U.S. Dist. LEXIS 104521, at *28-30 (S.D. Tex. June 10, 2022) (No. 6:21-cv-16-DBT) (J.A.. 314-17). From early 2021 until the present, federal immigration law enforcement agents have refused to take custody of criminal aliens, although, prior to January 20, 2021, they routinely did so. *See* Guthrie Aff. ¶¶ 12, 15-17; Coe Decl. ¶¶ 15-16, 18-19.

*Second*, the increase in criminal activity—and thus the increased injury from that activity—comes from illegal aliens or those associated with alien smuggling:

- Edwards County saw a 62 percent increase in crimes leading to arrests after the initial memorandum, and the average number of inmates doubled. Guthrie Aff. ¶¶ 5 7. As Sheriff Guthrie stated, "The vast majority of detainees that my office has arrested since February 2021 are either illegal aliens or persons involved in activity relating to illegal immigration." *Id.* ¶ 9.

- In Kinney County, the number of criminal arrests of illegal aliens in 2021 was more than six times the number of such arrests in 2020, and in 2022 the number of such arrests is already more than double their number in 2021. Coe Decl. ¶ 9. The overwhelming majority of people arrested in Kinney County after January 20, 2021 were illegal aliens or people involved in the smuggling of illegal aliens. *Id.* ¶ 12. Indeed, in fiscal year 2022, to deal with the continuing dramatic increases, over pre-February 2021 levels, of crimes committed by illegal aliens and smugglers, the Kinney County Sheriff spent well over $50,000 more in law-enforcement and detention expenses than the county was or will be reimbursed for through Operation Lonestar and other Texas programs designed to offset such additional expenses. Coe Decl. ¶ 13. (And, of course, because the sheriff's budget comes from county funds, the county, too, suffers financial injury from these continuing increases in crimes committed by illegal aliens and those trafficking them.)

- McMullen County saw a *more than eight-fold increase* in the number of crimes committed. Shelton Aff. ¶ 6. That increase was attributable to the increase in the number of crimes committed by illegal aliens and by those trafficking illegal aliens. *Id.* ¶ 10. For example, the number of people charged with alien smuggling increased from one in February-July 2020 to 26 in February-July 2021. *Id.* ¶ 7.

As with the decrease in federal enforcement, the increase in illegal conduct and the associated costs to the Texas County Movants is clear.

*Third*, it is obvious that "deportable criminal aliens who remain[] in the United States often commit[] more crimes before being removed," *Demore v. Kim*, 538 U.S. 510, 518 (2003) (citing *Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 101st Cong., 1st Sess., 54, 52 (1989)), and even more obvious that they will commit even more crimes if petitioners fail to comply with the INA's removal requirements. As the district court noted:

> The Tarrant County Sheriff's Office examined the recidivism rates for inmates with immigration detainers by examining the criminal-history files of every such inmate jailed as of that date. In January 2022, it found a recidivism rate (indicated by prior jail time) of roughly 90% for that population, compared to 69% in October 2021. [Dkt. No. 217 at 107.]

J.A. 320. The district court also noted that

> [a] 2018 study from the United States Department of Justice's Bureau of Justice Statistics shows that state offenders generally recidivate at a 44% level within the first year following release, 68% within the first three, 79%

> within the first six, and 83% within the first nine. The same study shows that during the nine-year period following release, there were on average five arrests per released prisoner.

J.A. 319 (citing Mariel Alper, Ph.D., Matthew R. Durose, Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)* (U.S. Dep't of Justice May 2018), *Texas v. United States*, No. 6:21-cv-16-DBT (S.D. Tex.)). Releasing criminals likely to recidivate obviously leads to more crime, wholly apart from the magnet effect of attracting the criminals here in the first place.

*Fourth*, while the illegal aliens and human traffickers are not defendants here, their presence in the affected counties is both caused by and traceable to petitioners' actions. Indeed, the Chief of the United States Border Patrol acknowledged as much in a recent deposition in related litigation brought by the State of Florida against the same unlawful actions and inaction:

> Q. Okay. Why is it important to detain and remove demographics that are amenable to the Border Patrol?
>
> A. One, you want to make sure you have consequences.
>
> Q. Okay. And if you don't have consequences, what is likely going to happen?

MR. DARROW: Objection.

A. In my experiences—in my experience, we have seen increases when there are no consequences.

Q. Okay. So if migrant populations believe that they're going—there are not going to be consequences, more of them will come to the border? Is that what you're saying?

MR. DARROW: Objection.

A. There is an assumption if migrant populations are told that there's a potential that they may be released, that yes, you can see increases.

Q. Okay. And if you see—and so if you do not—you said number one, consequences. Are there any other things that—other than just that one, consequences? Is there a two or a three?

A. Two or three what?

Q. Well, you said number one, consequences. I didn't know if there were—if that was the complete list or there were other things that—

A. Affect the flow?

Q. Yeah.

> A. Of course, there's many things. There's, you know, what our partners to the south do, our ability to communicate the dangers, our ability to impact the criminal organizations, smuggling organizations that are trafficking the migrant populations, our ability to deploy technology and manpower in areas where we're starting to see greater flows. All of those factor into the flow and how it's managed.
>
> Q. Okay, and if you're not detaining and removing demographics that are amenable and the flow will compound, so it will increase at an exponential rate? Is that what's being suggested here?
>
> MR. DARROW: Objection.
>
> A. Well, I do think it will increase, yeah.

Dep. of Raul L. Ortiz, Chief, United States Border Patrol, at 171-73 (July 28, 2022), *Florida v. United States*, No. 3:21-cv-1066-TKW-ZCB (N.D. Fla.) (App. 169a-172a) (emphasis omitted). By removing the "consequences" of illegal entry, the challenged agency actions and inaction caused the influx of the third-party illegal aliens and the human-trafficking operations that bring them here. The likelihood that criminal aliens will recidivate further establishes traceability because there is an obvious link between government actions and aliens' future unlawful behavior, as shown by the evidence establishing that aliens have historically behaved in that manner:

"Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce*, 139 S. Ct. at 2566. Both by drawing more illegal aliens here and by not enforcing the INA on the aliens who come here, the federal petitioners' INA non-enforcement causes the Texas County Movants' injuries.

The Texas County Movant's injuries are redressable. Because the challenged memoranda have prevented removals that previously occurred, enjoining the memoranda's policies would improve the Texas County Movants' position. And this Court may enjoin those policies, and issue injunctive relief to mandate INA compliance. 8 U.S.C. § 1252(f)(1).

### 2. The FPF Movants have standing.

FPF suffers concrete injury—the diversion of significant resources to respond to the challenged memoranda. Under *Havens Realty Corp. v. Coleman*, if the challenged practices "have perceptibly impaired" an organization's ability to fulfill its mission, "there can be no question that the organization has suffered injury in fact." 455 U.S. 363, 379 (1982). A concrete and demonstrable injury to an organization's activities, along with the "consequent drain on the organization's resources," is sufficient to establish Article III standing. *Id.* FPF can demonstrate the requisite injury here.

FPF has to divert significant resources in order to counteract the challenged memoranda and their consequences for its ICE officer members. FPF has had to devote more than 50 percent of its time in the wake of the memoranda on their impact on members' ability to comply with the requirements of federal law, and has spent more than $1,000 per year[5] in communications with members regarding the memoranda, FPF Aff. ¶¶ 9, 11 (Aug 25, 2021), an expenditure that still continues. In addition, because of this diversion of resources for non-routine actions, FPF has had to forgo planned efforts in public education campaigns on issues faced by federal law enforcement officers, in negotiating with third-party venders to obtain product discounts and insurance discounts for members, and in taking other actions related to FPF's operation. *Id.* at ¶ 10. These facts easily satisfy the requirements for diverted-resource organizational standing; the need to address the memoranda has perceptively impaired FPF's mission by compelling it to divert both the majority of its man-hours from planned activities to non-routine actions and a significant amount of its financial resources.

In addition to FPF's diverted-resource injury in its own right, FPF also has associational standing to assert the injuries of its ICE officer members, who must choose between following petitioners' *ultra vires*

---

[5] What is significant depends of course on the context. FPF is a small, fledgling organization without substantial assets. FPF Aff. ¶¶ 6, 8 (Aug. 25, 2021). Spending over $1,000 per year is *significant to FPF*, and the challenged memoranda unquestionably drain its resources.

dictates or following the Constitution and the INA. Put another way, FPF members must choose between violation of their employer's directives and their oath of office:[6]

> Appellants have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with § 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation.

*Bd. of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968). Wholly apart from the adverse concrete consequences—such as the reduction of their employer's funding in *Allen* or adverse employment consequences here—the pressure to follow an unlawful order—the "so-called Nuremberg defense"—"rais[es] profound questions of moral philosophy and individual responsibility." *Negusie v. Holder*, 555 U.S. 511, 526 (2009) (Scalia, J., concurring) (internal quotation marks omitted); *cf. United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 411 (D.C. Cir. 2006) ("[N]othing gives a soldier authority for a self-help remedy of disobedience") (internal quotation marks

---

[6] All federal employees take an oath of office under 5 U.S.C. § 3331.

omitted). As explained below, the APA gives federal officers the "self-help remedy" of actions such as *Coe*.

The Fifth Circuit has rejected such injury as too speculative, *Crane v. Johnson*, 783 F.3d 244, 253-55 (5th Cir. 2015), but that finding is inconsistent with *Allen*. *See South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1039 (1980) (White, J., dissenting from the denial of a writ of *certiorari*) (noting circuit split on the "continuing validity" of *Allen*). To the extent that this Court would revisit *Allen* to require more than violating an oath to establish standing, here, the threat of discipline to an officer who took enforcement actions not permitted under the memoranda and the processes set forth in them is more than sufficient.

Although petitioners argued in *Coe* that the Civil Service Reform Act ("CSRA") precludes FPF's claims, Defendants' Motion to Dismiss, *Coe v. Biden*, No. 3:21-cv-0168-JVB (S.D. Tex.) (Dkt. No. 62) at 36-39; App. at 142a-146a, the D.C. Circuit has characterized that theory as "meritless" *vis-à-vis* an APA rulemaking challenge:

> The appellant has also argued that this case cannot be brought under the Administrative Procedure Act because provisions in the Civil Service Reform Act of 1978 ("CSRA") established the exclusive means to review the decisions at issue here. This claim is meritless. It is one thing to say that when a statute provides a detailed scheme of

> administrative protection for defined employment rights, less significant employment rights of the same sort are implicitly excluded and cannot form the basis for relief directly through the courts. It is quite different to suggest, as appellant does, that a detailed scheme of administrative adjudication impliedly precludes pre-enforcement judicial review of rules.

*Nat'l Treasury Emps. Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (citations omitted). FPF and its members have the right under the First Amendment and the APA to comment on INA rulemakings. With respect to using the APA rulemaking process to educate their agencies about the INA's requirements to avoid future employment disputes, moreover, the CSRA-preclusion argument impermissibly attempts to graft a "nexus" requirement onto Article III. *See Duke Power*, 438 U.S. at 78 (relying on aesthetic environmental injury to challenge the Price-Anderson Act's damage caps on a future nuclear disaster as a taking without just compensation). Because there is no such nexus requirement outside taxpayer-standing cases, *id.*, CSRA does not prevent FPF's members from seeking to avoid the burden of a future CSRA process with an ounce of prevention in the rulemaking process.

Like respondents, Movants assert procedural injury from the federal petitioners' failure to have acted by APA notice-and-comment rulemaking. Because they have concrete injuries, this type of

procedural injury lowers the Article III threshold for immediacy and redressability. *Lujan*, 504 U.S. at 571-72 & n.7 (noting that a proper procedural-injury plaintiff "can assert that right without meeting all the normal standards for redressability and immediacy"); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (holding that procedural claims are fully formed at the procedural violation and "can never get riper"). Furthermore, procedural-rights plaintiffs have standing for a "do-over" under the proper procedures and standards, even if the agency might make the same choice. *See FEC v. Akins*, 524 U.S. 11, 25 (1998); *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002) ("If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter"). Movants thus also have procedural standing to challenge the agency actions and inaction here.

## REQUESTED RELIEF

Movants respectfully request that the Court allow them to intervene as respondents in this action.

Absent a prior ruling on this motion, Movants will file their merits brief as movants for intervention and—in the alternative—as *amici curiae*.

## CONCLUSION

The motion to intervene should be granted.

Dated: October 24, 2022 Respectfully submitted,

KRIS W. KOBACH
Kobach Law, LLC
P.O. Box 155
Lecompton, KS 66050
(913) 638-5567
kkobach@gmail.com

CHRISTOPHER J. HAJEC
*Counsel of Record*
MATT A. CRAPO
Immigration Reform Law Institute
25 Massachusetts Ave. NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

*Counsel for Movants*