No. 22-58

IN THE

Supreme Court of the United States

UNITED STATES, *ET AL.*, *Petitioners*,
v.
TEXAS, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Respondents

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Citizens United is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). These organizations were established, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. The Presidential Coalition, LLC is a political committee under IRC section 527.

These *amici* are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and *amici* in important cases in which these legal principles are at stake. The Presidential Coalition has filed *amicus* briefs in numerous immigration-related cases.

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[1] It is hereby certified that counsel for Petitioners and for Respondents have filed blanket consents to the filing of *amicus curiae* briefs; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

The States of Texas and Louisiana brought this action, *inter alia*, against the United States, the U.S. Department of Homeland Security ("DHS"), and the DHS Secretary (now Alejandro Mayorkas), in the U.S. District Court for the Southern District of Texas. The plaintiff States challenged DHS directives issued in January and March 2021, culminating in a Final Memorandum issued by Secretary Mayorkas on September 30, 2021. That Final Memorandum directed federal immigration agents to essentially disregard the command of two federal statutes mandating detention and deportation of certain illegal aliens.

The first of the statutes in question is 8 U.S.C. § 1226(c), which states that "[t]he Attorney General **shall** take into custody any alien" who is inadmissible into the country or deportable due to commission of any of a number of enumerated crimes. (Emphasis added.) The other is 8 U.S.C. § 1231(a)(1)(A), which states "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General **shall remove the alien from the United States** within a period of 90 days (in this section referred to as the 'removal period')." (Emphasis added.) And subpart (a)(2) then requires "[d]uring the removal period, the Attorney General **shall detain** the alien. **Under no circumstance** during the removal period **shall the Attorney General release** an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable

under section 1227(a)(2) or 1227(a)(4)(B) of this title." (Emphasis added.)

The Final Memorandum directed federal immigration agents that, rather than observing the statute's blanket rule of detention and deportation of aliens convicted of the enumerated crimes, agents "'should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.'" *Texas v. United States*, 2022 U.S. Dist. LEXIS 104521, *20 (S.D. Tex. 2022). The Final Memorandum also directed agents to "no longer presumptively subject[] aliens convicted of aggravated felonies to enforcement action, including detention." *Id.* at *20-21.

On June 10, 2022, the district court determined that "the Final Memorandum is ... contrary to law, arbitrary and capricious, and failed to observe procedure," using its power of vacatur. *Id.* at *111, *116. The court applied the vacatur nationally since it had found the Final Memorandum unlawful in its entirety, including under the Administrative Procedure Act ("APA"), thus requiring nationwide effect. *Id.*

The government appealed the vacatur to the Fifth Circuit. On July 6, 2022, on similar reasoning to the district court's, the Fifth Circuit denied the government's request for a stay of the vacatur pending appeal. *Texas v. United States*, 40 F.4th 205, 229 (5th Cir. 2022).

The government promptly applied to this Court for a stay of the lower court's order, and alternatively suggested that this Court could treat the application for stay as a petition for certiorari before judgment. On July 21, 2022, this Court denied the application for stay, but granted certiorari. *United States v. Texas*, 2022 U.S. LEXIS 3279 (2022). This Court directed the parties to brief three questions:

> 1. Whether the state plaintiffs have Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law;
> 2. 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; and
> 3. Whether 8 U.S.C. §1252(f)(1) prevents the entry of an order to "hold unlawful and set aside" the Guidelines under 5 U.S.C. §706(2).

STATEMENT

A decade ago, this Court issued an opinion which set the stage for the current conflict between Respondent states and the federal government. In *Arizona v. United States*, 567 U.S. 387 (2012), based on preemption principles, this Court struck down four provisions of Arizona law attempting to address what Justice Kennedy termed "the large number of aliens within its borders who do not have a lawful right to be in this country" (*id*. at 392-93) as "[h]undreds of thousands of deportable aliens are apprehended in Arizona each year" (*id*. at 397). Justice Kennedy

concluded that "Congress intended to preclude States from 'complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations'...." (*id.* at 403), striking down three of four state statutes, while deferring consideration on the fourth. Justice Kennedy's conclusion about preemption was predicated on the false notion that, by ratification of the Constitution, states divested their inherent power as sovereigns to control their own borders.

Justice Kennedy grounded his constitutional conclusion primarily on Article I, Section 8, clause 4, granting the national government power to "'establish an uniform Rule of Naturalization.'" *Id.* at 394. As the second basis for that power, he identified "its inherent power as sovereign to control and conduct relations with foreign nations...." *Id.* at 395. Justice Kennedy never relied on a different "inherent power" — which Justice Scalia identified as "the defining characteristic of sovereignty" — "the power to exclude from the sovereign's territory people who have no right to be there." *Id.* at 417 (Scalia, J., dissenting). There was good reason why Justice Kennedy did not address that threshold issue, for if he had, he would have been required to admit that each state has exactly the same sovereign power as the national government to control its own borders. And, not one word of the U.S. Constitution can be found which divested states of that power, transferring it to the national government. These propositions were demonstrated conclusively by Justice Scalia in his dissent, drawing on many historical and legal sources. He posed the question: "Would the States conceivably have entered into the Union if the Constitution itself contained the Court's

holding?" He detailed the delegates' jealously guarded independence and desire to protect their states' sovereignty. *Id.* at 436 (Scalia, J., dissenting).

Justice Scalia forecast the dispute now before the Court, asking how the States would react to "a Federal Government that does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude.... Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?" *Id.* at 436 (Scalia, J., dissenting).

This Court's deeply flawed decision in *Arizona v. United States* has denied to the States their inherent right to exclude those not lawfully there. Now, having transferred all power of exclusion to the national government, the question before this Court is whether it will allow the Federal Executive to willfully refuse to protect the border and enforce the Nation's immigration laws.

SUMMARY OF ARGUMENT

When this Court decided *Arizona v. United States* in 2012, it denied to the States their right as sovereigns to exclude persons illegally within their borders. At that point, the States became wholly dependent on the federal government's protection of the nation's borders. In dissent, Justice Scalia anticipated the fundamental issue in this case — what would happen if a federal government "does not want to enforce the immigration laws as written?" Under

the *Arizona* decision, the next step available to the States was that taken here — to petition federal courts to require that enforcement.

The Biden Administration has not just re-interpreted provisions of the Immigration and Naturalization Act mandating detention and deportation to make them optional, it has instituted a scheme of training and reviews to minimize enforcement even further. The federal government asks this Court to declare the States have no standing to protect their own interests and that of their citizens, disregarding the harm they have suffered and the "special solicitude" ordinarily granted States.

The Final Memorandum under review cannot be viewed in isolation, but as part of a Biden Administration government-wide plan to open the nation's borders. Every effort at border enforcement has been frustrated by a deliberate plan that has resulted in 4 million illegal aliens entering the country in the first 18 months of President Biden's watch and a boon to Mexican cartels, drug dealers, human traffickers, and terrorists — with over 100 people on the terror watch list having been caught while others slip by. Although the Final Memorandum is defended in terms of a reasonable allocation of scarce resources and prosecutorial discretion, the circuit court found those reasons bogus. The Government's rationale is a pretext that cannot be accepted under this Court's decision in *Department of Commerce v. New York*.

Lastly, the Court should anticipate that the Biden Administration will resist any decision designed to

compel it to enforce the nation's immigration laws as written. Disregard of those laws is not just a violation of the statutory scheme, but also the President's constitutional duty to Take Care that the nation's laws be faithfully enforced. This clear constitutional duty cannot be evaded by claims of prosecutorial discretion that undergirds the Government's entire justification for its non-enforcement policies.

ARGUMENT

I. RESPONDENTS TEXAS AND LOUISIANA ARE SOVEREIGN STATES WITH STANDING TO CHALLENGE THE FINAL MEMORANDUM.

A. Respondent States Have Asserted Real and Particularized Harm More than Sufficient to Establish Standing to Challenge the Final Memorandum.

Respondent States allege that the Final Memorandum is contrary to law because it treats sections 1226(c) and 1231(a)(2) of the Immigration and Naturalization Act ("INA") as being optional, not mandatory. In fact, Section 1226(c) provides: "The Attorney General **shall** take into custody" any alien who committed certain delineated crimes when the alien is released from state or local custody. (Emphasis added.) Section 1231(a) provides that "when an alien is ordered removed, the Attorney General **shall** remove the alien from the United States within a period of 90 days." (Emphasis added.)

Ignoring the statutory mandates, Petitioners have instead directed federal immigration agents to conduct an individualized "'assessment of the individual and the totality of the facts and circumstances,'" including various "aggravating" or "mitigating factors,"[2] before making the determination whether or not to detain. Moreover, the enforcement of these policies is being monitored with the apparent purpose to ensure that as many persons as possible are released and not detained.[3] Thus, the statutory mandate is converted not just to a discretionary option, but even worse, as the Final Memorandum puts its thumb on the scale to invert the statute to favor release of dangerous aliens and persons in the process of being removed.[4]

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[2] *Texas v. United States*, 2022 U.S. Dist. LEXIS 104521, at *84.

[3] *Texas v. United States,* 40 F.4th at 214 ("requir[ing] '[e]xtensive' and 'continuous' training, and the implementation of a 'rigorous review' process of all enforcement decisions ... grant[ing] an entirely new avenue of redress in the event they are removed or detained....").

[4] *See also id.* at 226 ("DHS's replacement of Congress's statutory mandates with concerns of equity and race is extralegal, considering that such policy concerns are plainly outside the bounds of the power conferred by the INA. Similarly, ... in identifying those who are a threat to public safety, DHS 'chose to place greater emphasis on the totality of the facts and circumstances' instead of identifying this group categorically. But DHS simply lacks the authority to make that choice when the statutes plainly *mandate* such categorical treatment. This is especially troubling in light of the fact that Congress attempted to prohibit such individualized consideration when it enacted § 1226(c) because the previous policy led to unacceptably high rates of criminal alien flight").

The States also assert that the Final Memorandum is arbitrary and capricious due to its failure to recognize the harm suffered by the Respondent States created by the release of aliens. Additionally, its adoption violates the Administrative Procedure Act because it substantively changed the regulatory scheme without following APA-required "notice and comment" procedures. The result of the claimed violations is harm to the States and harm to the People living in those States. The States have standing to assert all claims based on both categories of injuries.

In challenges brought by sovereign States against the national government, standing is usually asserted as a defense, but courts routinely grant standing based on "special solicitude." This doctrine recognizes that States are not ordinary litigants, but rather, like the national government, are sovereign entities. If a State believes that the national government has violated a federal statute or that the U.S. Constitution is harming the State and its sovereign prerogatives, its claims should ordinarily be entertained by federal courts. Allowing States to make such challenges in federal court protects principles of Federalism as well as the liberties of the American people.

Sadly, this case again reveals that the national government increasingly views States merely as administrative subdivisions that should not resist federal decisions.[5] The Department of Justice is more

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[5] *See*, *e.g.*, M. Rappaport, "Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's

concerned about defeating the challenge to an exercise of arbitrary federal power than protecting principles of Federalism. Thus Petitioners raise the specter that allowing States standing would result in "inject[ing] the federal courts into all manner of policy controversies at the behest of States seeking to secure by court order what they could not obtain through the political process." Brief for the Petitioners ("Pet. Br.") at 11-12. Petitioners mischaracterize the issue. The issue in this case is not at its root a "policy" or "political" dispute, but in response to the national Executive's blatant refusal to enforce mandatory aspects of the nation's immigration laws.

As this Court has made clear: "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA,* 549 U.S. 497, 518 (2007). When a suit is filed "'by a State for an injury to it in its capacity of *quasi*-sovereign'" (*id.*), the State "is entitled to special solicitude in [the] standing analysis." *Id.* at 520. As discussed in the Statement, *supra*, the United States in *Arizona v. United States* refused to recognize States as having all the attributes

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Tenth and Eleventh Amendment Decisions," 93 N.W. U. L. REV. 819, 832 (Spring 1999) ("In 1789 … [t]he primary meaning of 'State' was an independent nation or country that had most, if not all, of the powers of a sovereign nation.… Thus, the final paragraph of the Declaration of Independence proclaims that … these United Colonies are, and of Right ought to be, Free and Independent States..."). Emmerich de Vattel, whose treatise *The Law of Nations* was read and consulted by the Framers, uses the words "State" and "nation" interchangeably. *Id.* (De Vattel's treatise was cited in dissent by Justice Scalia in *Arizona v. United States* at 417.)

of a sovereign government and was able to convince this Court to do the same. Now, a decade later, the United States asks this Court to reject application of its doctrine of special solicitude, again denying the sovereignty of States.

Dual sovereignty is not a new concept, but it is routinely downplayed by the national government. Over 120 years ago, the Court described the importance of protecting the sovereignty of States under our constitutional scheme:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence... Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the **preservation of the States**, and the maintenance of their governments, are as much **within the design and care of the Constitution** as the preservation of the Union and the maintenance of the National government. [*Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (internal quotation omitted) (quoting *Tex. v. White*, 74 U.S. 700, 725 (1869) (overruled on other grounds)) (emphasis added).]

B. States Have a Duty to Resist and Challenge Unlawful Federal Actions.

The national government would have the Court believe that it alone represents the interests of Americans, when the fact is that here, the People of Texas and Louisiana have chosen to elect officials who share their outrage at the actions of the national Executive. Respondent States are exercising the role they should play in a Federalist structure. "'The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.'" *Id*. at 458 (quoting Federalist No. 45, G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001) at 241).

As this Court stated in *Gregory*, "[t]his federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society...." *Id*. at 458. While the Court explained that "the principal benefit of the federalist system is a check on abuses of government power" (*id*.), here, the national Executive would prefer to continue to disregard federal law without being checked by States or federal courts. And although this Court has asserted that "[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties" (*id*.) (internal quotations omitted), here the national government believes the States, and People acting

through their States, should not be able to invoke the protections of the Court.

Alexander Hamilton explained the duty of each sovereign:

> the general government will, at all times, stand ready to check the usurpations of the state governments; and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress. [Federalist No. 28, The Federalist at 138-39.]

He reiterated this point in Federalist No. 26:

> the state legislatures, who will always be not only vigilant, but suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but if necessary, the ARM of their discontent. [Federalist No. 26, The Federalist at 130.]

This role is exactly that which Respondent States seek to perform here — to check the lawless actions of the

national government and to protect the rights of sovereign States and their citizens.

Madison viewed the Federalist Structure as providing "a double security ... to the rights of the people. The different governments will control each other...." Federalist No. 51, The Federalist at 270. As the *Gregory* Court recognized, if Madison's idea of "'double security' is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty." *Gregory* at 459. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id*. at 458. If this Court recognizes its duty to resolve such disputes, it prevents the need for interposition by States — the next level of resistance that States occasionally have been forced to employ.[6]

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[6] Madison penned the Virginia Resolutions, calling for state governments to "interpose" against the national government's assault on the First Amendment via the "Alien and Sedition Acts" of 1798. "[T]he powers of the federal government [are] limited by the plain sense and intention of the instrument constituting that compact ... and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties there-to have the right, and are in duty bound, to interpose for arresting the progress of the evil...." The Virginia Resolutions, in K. Lash, ed., 1 The

C. "Special Solicitude" Is an Imperative of a Federalist Structure.

This Court has recognized the special role of States in litigation since at least its decision in *Georgia v. Tennessee Copper Co.* in 1907.[7] In his concurrence, Justice Harlan articulated the "special solicitude" doctrine: "[T]his court, sitting in this case as a court of equity, **owes some special duty to Georgia as a State**, although it is a party, while under the same facts**, it would not owe any such duty to the plaintiff, if an individual**." *Id*. at 240 (Harlan, J., concurring) (emphasis added).

This Court's longstanding approval of "special solicitude" for State standing is rooted in recognition that the constitutional text, as well as our nation's history and tradition, demand protection of Federalism and the counterbalancing of federal versus State power. States can do what the people cannot. "The federal government, with its broad constitutional authority, its army of administrative agencies, and its vast financial resources, possesses almost unlimited power to regulate the lives of its citizens. The individual voter has little hope of influencing the course of this federal leviathan. Given these realities, state governments provide an institutional check on potential abuses of federal power." D. Merritt, "The

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Reconstruction Amendments: The Essential Documents at 38 (Univ. of Chicago Press: 2021).

[7] *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

Guarantee Clause and State Autonomy: Federalism for a Third Century," 88 COLUM. L. REV. 1, 4-5 (Jan. 1988).

The importance of special solicitude for States is especially acute in conflicts with the national government — in particular where, as here, the national Executive has refused to follow federal law, working destructive consequences on the Respondent State governments. As this Court has stated, "neither [federal or State] government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

D. Respondent States Also Have *Parens Patriae* Standing.

For over a century, this Court has also recognized the right of States to sue as *parens patriae* in a "quasi-sovereign" capacity to defend the rights of their citizens. "These cases [beginning with *Louisiana v. Texas*, 176 U.S. 1 (1900)] establish the right of a State to sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972) (partially abrogated by statute on other grounds).

Respondents assert *parens patriae* standing to defend the rights of their citizens that have been harmed by the Final Memorandum, as a quasi-sovereign interest of the States. It is not only the national government that can assert the interests of the People. Both sovereign entities can exercise authority in the same space. This Court has made

clear that a function of State sovereignty is the right of States to punish crimes committed within their jurisdiction and against their citizens. Punishment by both sovereigns does not violate the Constitution's "double jeopardy" prohibition. "[W]here there are two sovereigns, there are two laws, and two 'offences.'" *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019). Thus, an act "denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Id.* at 1967 (internal quotation omitted).

The district court made detailed factual findings as to the massive costs Petitioners' failure to follow the law has imposed on the State government of Texas. *Texas v. United States*, 2022 U.S. Dist. LEXIS 104521, at *25-38. Criminal actions by inmates who should have been detained by Petitioners resulted in millions of dollars in jail costs and a multitude of violent crimes against Texas citizens.[8]

This Court has tied the issue of "quasi-sovereign capacity" to a State's ability to sue on a *parens patriae*

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[8] Tarrant County alone "averages 246 inmates with immigration detainers at any given time. The Tarrant County Sheriff estimates the average cost of jailing those inmates to be $3,644,442 per year." *Texas v. United States*, 2022 U.S. Dist. LEXIS 104521, at *33. "As of January 7, 2022," inmates who should have been detained by Petitioners faced a combined "seven charges for murder, twenty-six charges for aggravated assault with a deadly weapon, and eight charges for aggravated sexual assault of a child." *Id.* at *33-34. The sheriff calculated a 90 percent recidivism rate among these inmates, showing that the massive costs imposed upon Texas continue to recur. *Id.*

basis on behalf of its citizens. Justice Stevens wrote for the Court in *Massachusetts v. EPA*, "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (internal quotation omitted). As the district court found, Texas not only likely would attempt, but long since has attempted, to address the problem of criminal aliens on its own, since Petitioners have ignored the command of the INA to detain criminal aliens, and Texas has resorted to detainment at the cost and by agents of the State. *See Texas v. United States*, 2022 U.S. Dist. LEXIS 104521 at *41.

This Court has articulated various independent grounds for determining the existence of a quasi-sovereign interest. "These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being ... of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 607 (1982).

Petitioners cite to *Massachusetts v. Mellon*, 262 U.S. 447 (1923) for the proposition that States may never sue the federal government as *parens patriae*. But *Mellon* is unavailing for two reasons. First, as Respondents correctly point out, the case sought only to protect a States' residents "'from the operation of

[federal] statutes.'" Brief for Respondents ("Resp. Br.") at 23. The *Mellon* Court also stated that "[w]e need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress." *Mellon* at 485. So the case does not stand for Petitioners' desired proposition that a State can never sue the national government as *parens patriae*.

Second, to the extent that *Mellon* could be read to say that in conflicts between the national government and State governments, the State's *parens patriae* interest is always subordinated to the interest of the national government, it was wrongly decided, or at least limited by *Gregory*. *Gregory's* compelling historical case that the State governments were intended by the Framers as a counterbalance to "encroachments" by the national government is well-grounded in the text, history, and tradition of the Constitution.

But this is not a case of a State challenging a federal statute as unconstitutional. The States are intervening to enforce a federal statute against a rogue Executive agency that the lower courts have found to be acting "contrary to law," to the injury of the State's "rightful status within the federal system" and the "health and well-being" of its citizens.

Here, Respondent States have demonstrated standing, giving this Court the authority to interpret the text of the INA, to declare that the Final Memorandum violates the INA, and to enjoin its effect,

thereby addressing the injuries suffered by the Respondent States and their citizens.

II. THE GOVERNMENT'S JUSTIFICATIONS FOR THE FINAL MEMORANDUM ARE A PRETEXT FOR THE BIDEN ADMINISTRATION POLICY TO THROW OPEN THE NATION'S BORDERS.

A. The Final Memorandum Is Just One Component of the Biden Administration's Policy to Open the Nation's Borders.

While campaigning for President, candidate Joe Biden declared: "We could afford to take in a heartbeat another two million people [per year]. The idea that a country of 330 million people cannot absorb people who are in desperate need … is absolutely bizarre."[9] Since becoming President, Joe Biden has pursued his goal with a vengeance, no matter what the law requires.

Within hours of entering office, President Biden began issuing Presidential Directives completely reversing the border protection and immigration policies of President Trump. His first such act was to shut down the building of a border wall. *See* "Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction (January 20, 2021)." That Proclamation

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[9] *See* B. Dane, "Joe Biden Wants 2 Million More Immigrants a Year," ImmigrationReform.com (Aug. 23, 2019).

asserted: "Like every nation, the United States has a right and a duty to secure its borders and protect its people against threats. But building a massive wall that spans the entire southern border is not a serious policy solution. It is a waste of money...." (It was later revealed by Senator James Lankford (R-OK) that "President Biden is paying professional construction contractors to babysit metal to the tune of $2 billion and counting, while at the same time we've seen a 20-year high number of migrants crossing our open border...."[10])

Thereafter followed his Proclamation of February 24, 2021 — *inter alia* revoking Trump Proclamation 10014, Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market.

To achieve his goal, President Biden also issued the following Executive Orders:

EO 13993 (Revision of Civil Immigration Enforcement Policies and Priorities) (Jan. 20, 2021) — *inter alia* revoking Trump EO 13768;

EO 14010 (Creating a Comprehensive Regional Framework To Address the Causes of Migration, To

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[10] M.K. Linge, "Biden spending over $2B to halt border wall construction amid migrant crisis," *New York Post* (July 24, 2021). *See also* "President Biden is Wasting Billions by Not Building the Border Wall," Interim Minority Staff Report of U.S. Senate Subcommittee on Government Operations and Border Management, Committee on Homeland Security and Governmental Affairs (July 2021).

Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (Feb. 2, 2021) — *inter alia* revoking Trump EO 13767;

EO 14012 (Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans) (Feb. 2, 2021) — *inter alia* revoking President Trump's Memorandum of May 23, 2019 (Enforcing the Legal Responsibilities of Sponsors of Aliens); and

EO 14013 (Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration) (Feb. 4, 2021) — *inter alia* revoking (a) Executive Order 13815 of October 24, 2017 (Resuming the United States Refugee Admissions Program With Enhanced Vetting Capabilities); (b) Executive Order 13888 of September 26, 2019 (Enhancing State and Local Involvement in Refugee Resettlement); (c) Presidential Memorandum of March 6, 2017 (Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry Into the United States, and Increasing Transparency Among Departments and Agencies of the Federal Government and for the American People).

Departments made other changes:

- Department of Homeland Security Memorandum, June 1, 2021 — Terminating the Trump "Migrant Protection Protocol."

- CDC Public Health Determination and Termination of Title 42 Order — Terminating Trump "Title 42" order.

This list is not exhaustive, but from it one can see that President Biden enlisted the entire federal government in his effort to make enforcement of federal laws more difficult and the borders more porous to illegal aliens.

The Former Acting Director of U.S. Immigration and Customs Enforcement, Thomas Homan, recently described the result of Biden immigration policies in dire terms:

- "lethal drugs are pouring across our border and spreading throughout the United States, killing Americans";
- During FY 2022 (October 1, 2021 - September 30, 2022) "56 people on the terror watchlist have been caught trying to cross the border between ports of entry — not to mention those who might have already slipped through"[11];
- "In June [2022] alone, more than 207,000 illegal immigrants were caught crossing the southern border, marking a 310 percent increase from average June apprehensions under Trump";

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[11] That number has now been updated to 98 people on the terror watchlist. *See* CBP Enforcement Statistics Fiscal Year 2022, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics (last visited Oct. 25, 2022).

- "[R]oughly 4 million illegal immigrants have crossed the border in just 18 months since Biden has been in office;"
- "[S]ince [Biden] came into office over 13,000 pounds of fentanyl have been seized at the southern border — enough to kill millions of Americans many times over." [T. Homan, "Biden's Open Borders Betrayal," *The Hill* (Aug. 8, 2022).]

Based on these statistics and observing policy changes, former Director Homan concludes:

> **Biden's open borders are by design**. He came into office, signed executive orders and dismantled the immigration system the Trump administration built.... The floodgates are wide open, and migrants surging to our border know that more likely than not, if they cross over they have a real shot at staying in the United States. [*Id*. (emphasis added).]

B. The Government's Justifications for Its Final Memorandum Are Pretextual.

Russian chess champion Gary Kasparov used a Tweet (Dec. 13, 2016) to warn: "The point of modern propaganda isn't only to misinform or push an agenda. It is to exhaust your critical thinking, to annihilate truth." The Biden Administration continually spreads a false narrative to the American People, including

denying there is a border crisis.[12] The Biden Administration has also tried to convince the American People that the Trump border wall accomplished nothing while wasting resources, that immigration is due to climate change, and that illegal immigration comes from our "broken immigration system." Secretary Mayorkas asserted that the Final Memorandum was a reasonable decision as to how to best enforce federal immigration law based on limited resources, but the court would have none of that.

1. The uncontroverted detainer data "**plainly contradict**" the government's assertion that "scarce resources" required the agency to "reconfigure" its enforcements "without implicating enforcement levels." *Texas v. United States*, 40 F.4th at 217 (emphasis added).

2. DHS's reliance on the excuse of "'insufficient resources and limited detention capacity' was **not in good faith**." *Id.* at 217, n.5 (emphasis added).

3. "The Final Memo does not represent a one-off enforcement decision, but rather a **calculated, agency-wide rule limiting ICE officials' abilities** to enforce statutory law.... DHS's interpretation of the governing statutes seems **obviously inconsistent** with their meaning.... This rule gives every indication of being a 'general policy that is **so extreme as to amount to an abdication** of its statutory responsibilities.'" *Id.* at 222 (emphasis added).

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[12] *See* N. Lim, "Don't say 'crisis': Biden team complicates border drama by refusing to utter dreaded word," *Washington Examiner* (Mar. 20, 2021).

In certain cases, this Court has examined whether the bases asserted in court for an administrative action were genuine or pretextual only. *See Dept. of Commerce v. New York*, 139 S. Ct. 2551 (2019). There, Chief Justice Roberts concluded that, "viewing the evidence as a whole ... the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 2575. There is every reason to believe that the legal principle which was applied to the Trump Administration in 2019, should now be applied to the Biden Administration.

The Biden Administration came into office promising that it would repeal all of the prior Administration's restrictions on immigration — lock, stock, and barrel. To be sure, the *New York* decision recognized that "[i]t is hardly improper for an agency head to come into office with policy preferences and ideas." *Id.* at 2574. However, the threshold decision to repeal all Trump immigration policies demonstrates that there was no independent judgment being exercised by the three heads of the Department of Homeland Security, including Secretary Mayorkas, that participated in the events that led to the Final Memorandum.

As Chief Justice Roberts stated only three years ago, "we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a

naiveté from which ordinary citizens are free.'" *Id*. at 2575 (citation omitted).

"The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." *Id*. at 2575-76.

The record demonstrates that, as with other Biden immigration "reforms," the Final Memorandum was implemented not because Secretary Mayorkas had scarce resources or different enforcement priorities from the prior administration, but because he and President Biden have been working hard to maximize open borders by minimizing enforcement of our nation's immigration laws.

III. THE BIDEN ADMINISTRATION'S NON-ENFORCEMENT POLICIES VIOLATE THE TAKE CARE CLAUSE AND CANNOT BE JUSTIFIED BY CLAIMS OF PROSECUTORIAL DISCRETION.

In district court, the Respondent States asserted a claim (Complaint, Count VI) based on the President's violation of the Constitution's Take Care Clause (Article II, Section 3). The district court declined to rule on that Count, preferring to decide the case on statutory grounds, under the general rule that "[a] federal court normally does not reach a constitutional

question if it can dispose of the case on another ground." *Texas v. U.S.*, 2022 U.S. Dist. LEXIS at *109.

Although the Take Care Clause claim is not mentioned in the Questions Presented, this constitutional issue lurks in the background. It could come to the fore if the Final Memorandum is invalidated by this Court and the Biden Administration continues to implement non-enforcement policies *de facto*. It could also arise if the Biden Administration were to withdraw the Final Memorandum to evade review while continuing its non-enforcement policies.[13] The suit brought by the Respondent States was filed on April 6, 2021, 18 months ago, and by the time another suit could be filed and reach this Court, President Biden's term likely would have ended and the issue mooted, while the damage to the nation continued, perhaps irreparably. For these reasons, these *amici* urge the Court to address the President's duty under the Take Care Clause to enforce immigration law — due to the real possibility that the Biden Administration will choose every avenue possible to continue its "open border" policies.

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[13] This would be similar to what the Obama and Biden Administrations did with respect to DACA, where different challenges to immigration nonenforcement have been subject to legal challenges ever since. Facing a district court injunction and an appeal in the Fifth Circuit, the Biden Administration sought to cure DACA by publishing it for notice and comment, then issuing a final rule. *See* Deferred Action for Childhood Arrivals, 87 *Fed. Reg.* 53,152 (Aug. 30, 2022). As a result, the Fifth Circuit has remanded the challenge to Obama's DACA policy to the district court to reconsider its decision in light of the final rule.

A. The Take Care Clause.

The Final Memorandum violates not only the Immigration and Naturalization Act, but also the President's duty to "take Care that the Laws be faithfully executed." As Justice Robert Jackson explained, the Take Care Clause signifies "the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

A President's violation of his duty to Take Care can be seen as an effort to usurp a much larger role in the legislative process than that granted him by the Constitution. A President may recommend legislation under Article II, Section 3, but under the Presentment Clause, Article I, Section 7, his power is limited to signing or vetoing a bill. As this Court has noted that "[a]lthough the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes." *Clinton v. New York*, 524 U.S. 417, 439 (1998). This Court viewed this silence as "equivalent to an express prohibition" on the post-enactment executive meddling with enacted statutes. *Id.*

The Biden Administration accuses the Respondent States of filing suit based on their own policy preferences (Pet. Br. at 11-12), but whenever a President acts to "effect the repeal of laws ... without observing the procedures set out in Article I, § 7 ... he

is rejecting the policy judgment made by Congress and relying on his own policy judgment." *Clinton* at 444-45.

Petitioners cite the Take Care Clause to urge that a President has authority to decide how to enforce federal statutes as he believes best, regardless of what those laws may require, thereby depriving any party of standing to invoke a federal court's authority to require the President to follow the law. *See* Pet. Br. at 18-19. For this remarkable claim, the federal government offered one thin reference to a case which involved an enforcement decision relating to unharmed private plaintiffs, which is of no application here.

Allowing the President to disregard a federal law — whether through the Final Memorandum or through an unwritten policy — would effectively grant the President an ongoing, unlimited, and unchecked veto at-will over any law ever enacted thereafter. We have been down this road before in the area of immigration with President Obama's unlawful suspension of federal immigration laws with his DACA policy. This "threat of nonenforcement gives the President improper leverage over Congress by providing a second, postenactment veto." R. Delahunty & J. Yoo, "Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause," 91 TEX. L. REV. 781, 795 (2013).

B. Prosecutorial Discretion.

"Using the words 'discretion' and 'prioritization,' the Executive Branch claims the authority to suspend statutory mandates." *Texas v. U.S.*, 2022 U.S. Dist. LEXIS at *4. Further, "[a]n overarching theme of the Government's argument in this case is that it has 'prosecutorial discretion' to make these decisions, and this precludes judicial review." *Id*. at *78. To be sure, "prosecutorial discretion" has deep roots in the common law, but provides no support for the wholesale nonenforcement of a mandatory provision of federal law.

The continuum of prosecution and enforcement of laws is sometimes described as a sliding scale. On one end of the scale, it is inflexible, 100 percent enforcement in every case. Next to that is the exercise of legitimate prosecutorial discretion not to enforce the law in a particular case as to a particular person. On the other end of the scale is the wholesale refusal to enforce the law in all cases as to any persons. Within this continuum, there is a line that cannot be crossed where the President cannot adopt a "'policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). *See* K.R. Thompson, "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others," U.S.

Department of Justice, Office of Legal Counsel (Nov. 19, 2014) at 7.[14]

Prosecutorial discretion does not trump the Take Care Clause where, as here, discretion is used as mere cover for evasion of Congressional mandates. This is precisely the type of "abdication of ... statutory responsibilities" about which the Supreme Court warned in *Heckler* (at 833 n.4). The same constitutional violation would occur through either an express policy, such as the Final Memorandum, or through a *de facto* policy of non-enforcement.

CONCLUSION

For the reasons stated *supra*, the judgment of the district court should be affirmed.

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[14] The Congressional Research Service agrees that "[a] policy of non-enforcement that amounts to an abdication ... could potentially be said to violate the Take Care Clause." K. Manuel & T. Garvey, "Prosecutorial Discretion in Immigration Enforcement: Legal Issues," Congressional Research Service (Dec. 27, 2013), R42924, summary page.

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