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, ET AL.,
Movants.

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

BRIEF OF TEXAS SHERIFFS AND COUNTIES AND THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION, AS MOVANTS FOR INTERVENTION OR, ALTERNATIVELY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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QUESTIONS PRESENTED

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).

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 for intervention—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.

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INTEREST OF MOVANTS FOR INTERVENTION OR *AMICI CURIAE*

On October 24, 2022, six Texas county sheriffs, their respective counties, an additional Texas county, and the Federal Police Foundation, ICE Officers Division ("FPF" and, collectively, "Movants"), moved this Court for leave to intervene in this action to seek injunctive relief against the same federal memoranda challenged by respondents Texas and Louisiana (collectively, "States"). In the event this Court denies the motion to intervene, Movants request that the Court treat this brief as a brief *amici curiae* in support of the States and affirmance.[1] Movants' suit against the same federal policies is stayed pending resolution of this action, and 8 U.S.C. § 1252(f)(1) precludes lower courts from entering the injunctive relief Movants seek in order to stop their exposure to illegal immigration-related crime, increased law-enforcement costs, and the dilemma—faced by FPF's members—of either violating their oaths of office or complying with unlawful federal policies. For these reasons, Movants have compelling interests in the questions presented here.

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[1] If the Court deems Movants as *amici curiae*, *amici* file this brief with all parties' blanket consent. Pursuant to Rule 37.6, counsel for *amici* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amici* and their counsel—contributed monetarily to preparing or submitting the brief.

OPINIONS BELOW

Movants adopt respondent States' statement of the Opinions Below. *See* States' Br. 1.

JURISDICTION

Movants adopt respondent States' statement of Jurisdiction. *See* States' Br. 1.

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the States' appendix. States' Br. App. 1a-14a.

STATEMENT OF THE CASE

Movants adopt the States' factual background. States' Br. 2-5. 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 one. The district court in *Coe* stayed that action 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). Given the unavailability of injunctive relief below, 8 U.S.C. § 1252(f)(1), and the inadequacy of alternate relief, Movants seek intervention here to obtain injunctive relief.

Under the challenged nonenforcement policies, the federal petitioners are refusing to remove illegal aliens who, under the Immigration and Nationality Act ("INA"), must be removed. In adopting the challenged policies, moreover, petitioners violated the notice-and-comment requirements of the Administrative Procedure Act ("APA"). As a result, the Texas County Movants face increased exposure to crime, with resulting costs to both public safety and the public fisc. The FPF has had to divert significant

resources to counteract the challenged memoranda and their consequences for its federal law-enforcement members.

SUMMARY OF ARGUMENT

The policies challenged in this case violate both federal statutory provisions and the U.S. Constitution. In contravention of the former, the Secretary of DHS's memorandum of September 30, 2021, setting forth "Guidelines for the Enforcement of Civil Immigration Law" (the "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 of DHS 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.

The Final Memorandum also provides 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, 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 the Final Memorandum. That memorandum is thus not only

directly contrary to statute, but an unconstitutional suspension of the law.

Only injunctive relief can cure these stark violations. Though *vacatur* would redress respondents' and Movants' injuries to a limited extent by voiding the Final Memorandum, it would leave petitioners free to create similar policies, or follow the same ones on an *ad hoc* basis. Similarly, a declaration that petitioners are violating their statutory duties would not compel compliance with the law; at most, ignoring such a declaration would be "inappropriate." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974).

The other factors for granting an injunction are easily met. Movants' financial harm, and harm to their law-enforcement operations, is irreparable, and the public interest would clearly be served by enforcement of the immigration laws as enacted by Congress, not as overwritten by the Final Memorandum.

ARGUMENT

I. THE CHALLENGED POLICIES ARE UNLAWFUL.

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). Under our Constitution, this sovereign prerogative is entrusted exclusively to Congress. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are … entrusted exclusively to Congress"). Thus, it is Congress that determines

which aliens are to be removed from the United States, even though it exercises that power through executive officers such as petitioners: "The power of Congress … to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised through executive officers …." *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893). Petitioner Mayorkas's authority to enforce the immigration laws under 6 U.S.C. § 202(5), which confers upon him the responsibility to "[e]stablish[] national immigration enforcement policies and priorities," however, cannot possibly be construed to authorize him to order subordinate employees to violate the requirements of federal law as enacted by Congress.

In exercising its authority over the border, Congress has specified numerous classes of aliens who are removable from the United States, including aliens who enter illegally, commit certain crimes, violate the terms of their status (visa overstays), obtain admission through fraud or misrepresentation, vote unlawfully, become a public charge, and whose work would undermine wages or working conditions of American workers. *See generally* 8 U.S.C. §§ 1182(a) (describing inadmissible aliens) and 1227(a) (describing deportable aliens). By simply defining the various classes of removable aliens and providing a procedure to adjudicate whether aliens are removable, *see* 8 U.S.C. § 1229a (establishing removal proceedings), Congress generally left the determination of whether to seek removal of specific aliens in the discretion of DHS. Thus, it is fair to say, "[a] principal feature of the removal system is the

broad discretion exercised by immigration officials." *Arizona v United States*, 567 U.S. 387, 396 (2012); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999) (discussing the pre-1996 practice of "deferred action" in which the Executive exercised discretion to decline to institute proceedings, terminate removal proceedings, or decline to execute a final removal order "for humanitarian reasons or simply for its own convenience").

A. The Final Memorandum violates the INA.

Congress did not, however, leave such discretion unbounded. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), PUB. L. NO. 104-208, 110 Stat. 3009-546, which restricts the discretion available to the Executive branch. IIRIRA 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); *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). The Final Memorandum is directly contrary to at least three statutory directives, and, with even more glaring unlawfulness, prevents immigration officers from taking any enforcement actions against aliens who do

not fall within a priority category under the guidelines. Because the Final Memorandum attempts to treat statutory directives as discretionary options, it is contrary to law and should be enjoined.

1. The Final Memorandum violates § 1226(c).

Congress has mandated the detention of certain criminal aliens during their removal proceedings. Under Section 1226(c), DHS "shall take into custody" certain criminal aliens when "released" from state or local custody. 8 U.S.C. § 1226(c); *see id.* (c)(1) (designating criminal offenses).

The mandatory nature of the detentions commanded by 8 U.S.C. § 1226(c) is well established. This Court has described detention under that statute as "mandatory." *Demore v. Kim*, 538 U.S. 510, 521 (2003). This Court has also described the intent of Congress when it created that mandatory detention requirement in 1996:

> Some studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country. *See*, *e.g.*, 1989 House Hearing 75; Inspection Report, App. 46; S. Rep. 104-48, at 32 ("Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond"). It was

> following those Reports that Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability.

Id.; *see also id.* at 518-19 (discussing the agency's previous failure to remove criminal aliens and the resulting cost to the nation). This Court upheld the constitutionality of this mandatory detention provision, recognizing that detention during deportation proceedings is a constitutionally valid aspect of the removal process. *Id.* at 523.

In contrast, the Final Memorandum states that DHS "personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly," J.A. 115, and that "[w]hether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories, [but by] an assessment of the individual and the totality of the facts and circumstances." J.A. 113. Even though § 1226(c) makes the fact of conviction alone sufficient to trigger mandatory detention, the Final Memorandum mandates that "personnel should not rely on the fact of conviction or the result of a database search alone." J.A. 115. The Final Memorandum also requires agency personnel to consider extra-statutory individual circumstances before permitting an enforcement action to be taken. J.A. 113-15 (listing types of aggravating and mitigating factors); *see also id.* at 331-39 (district court's finding that agency personnel are required to consider extra-statutory factors before taking enforcement action).

Nowhere in the statute does Congress's mandatory enforcement actions depend on consideration of individualized facts or circumstances.[2] Where Congress otherwise mandates action, weighing extra-statutory factors—aggravating or mitigating—to determine whether action is warranted is plainly unlawful. An executive agency's policy preference about how to enforce (or, in this case, not enforce) an act of Congress cannot trump the power of Congress: a Court may not, "simply … accept an argument that the [agency] may … take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

This Court has recognized that Congress has the authority to restrict executive discretion in this manner by statute: "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler v.*

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[2] That is not to say that individual facts and circumstances are irrelevant in Congress's immigration scheme. Congress has fashioned various forms of relief from removal in which individualized facts and circumstances may justify relief from removal. *See*, *e.g.*, 8 U.S.C. §§ 1182(h) (providing for a waiver of some grounds of inadmissibility); 1229b (providing for cancellation of removal and adjustment of status). In other words, Congress has provided for consideration of individualized facts and circumstances in determining whether an individual alien will be subject to immigration consequences.

Chaney, 470 U.S. 821, 833 (1985). Through IIRIRA, Congress circumscribed the Executive branch's discretion *not* to detain and remove illegal aliens. Unfettered discretion ceases to exist where federal law "not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures." *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (*en banc*).

Here, as in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), Congress established clearly defined factors requiring the executive agency to take action to enforce federal law. "The statute being administered [in *Dunlop*] quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Heckler*, 470 U.S. at 834. So, too, IIRIRA "quite clearly withdrew discretion from the agency." Petitioners cannot now by directive exercise the discretion that Congress took away. "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction." Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 (1967).

The Final Memorandum does not directly address any statutory enforcement mandate. Statutory mandates were addressed in an accompanying agency memorandum. J.A. 121-64. But there, though the agency acknowledged that certain detention mandates applied in cases where the agency had decided to pursue removal of an alien, it insisted that the decision whether to initiate removal proceedings in the first place is wholly discretionary. *Id.* at 157-60.

The Final Memorandum violates 8 U.S.C. § 1226(c) by attempting to transform the mandatory duty to detain into a discretionary decision, and therefore violates the express terms of federal law. That violation authorizes this Court to require petitioners to follow the law: "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under [5 U.S.C.] § 701(a)(2), and courts may require that the agency follow that law …." *Heckler*, 470 U.S. at 834-35.

Petitioners (at 30) suggest that "[i]f respondents' view were to prevail and any State could obtain an order requiring the Secretary to concentrate enforcement on one aspect of the scheme rather than another, it would be States and federal courts, rather than the Executive, that would determine how the agency uses its limited resources." But neither respondents nor Movants seek a court order imposing their respective policy preferences or immigration law enforcement priorities. Instead, Movants seek an order compelling petitioners to follow *Congress's* enforcement directives.

2. <u>The Final Memorandum violates § 1231(a).</u>

Congress also limited executive discretion regarding the removal of previously-deported aliens. 8 U.S.C. § 1231(a)(5) mandates the removal of an alien who has reentered the United States illegally after having been removed: "[T]he alien *shall* be removed

under the prior order at any time after the reentry." *Id*. (emphasis added).

This Court recently reiterated that 8 U.S.C. § 1231(a)(5) removes executive discretion in the matter. "Those reinstated orders are not subject to reopening or review, nor are respondents eligible for discretionary relief under the INA. Instead, they 'shall be removed under the prior order at any time after the reentry.'" *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2284 (2021) (quoting 8 U.S.C. § 1231(a)(5)). This Court also described 8 U.S.C. § 1231(a)(5) as imposing a "requirement" upon DHS. "The bar on reopening or reviewing those removal orders, as well as the *requirement* that DHS remove aliens subject to reinstated orders, also appears in § 1231(a)(5)." *Id*. at 2289 (emphasis added).

The only discretion left to DHS is that which the statute spells out: "§1231's directive … states that DHS 'shall' remove the alien within 90 days '[e]xcept as otherwise provided in this section.' §1231(a)(1)(A). And, as noted above, 'this section' provides for post-removal detention and supervised release in the event an alien cannot be removed within the 90-day removal period, §§1231(a)(3), (6)." *Id*. at 2291.

Thus, on its face, the Final Memorandum transforms a mandatory duty to remove into a discretionary option. Removal only occurs *if* the immigration officer considers non-statutory factors and concludes that those factors warrant enforcement action. This creation of extra-statutory discretion is contrary to law.

3. The Final Memorandum violates § 1225(b).

Congress has also established a comprehensive scheme governing the inspection, detention, and removal of illegal aliens who attempt to enter the United States without proper documentation, and has mandated certain enforcement actions be taken with respect to illegal border-crossers. *See generally* 8 U.S.C. § 1225. For instance, "an alien present in the United States who has not been admitted or who arrives in the United States … *shall* be deemed for purposes of this chapter an applicant for admission." 8 U.S.C. § 1225(a)(1) (emphasis added). This designation triggers § 1225(a)(3), which specifies that all applicants for admission "*shall* be inspected by immigration officers" (emphasis added).

Section 1225(b), which governs inspection of applicants for admission, distinguishes between two classes of arriving aliens. The first class consists of aliens who either have no entry documents or attempt to gain admission through misrepresentation or fraud ("B-1 aliens"). 8 U.S.C. § 1225(b)(1)(A)(i).[3] The other consists of all other arriving aliens ("B-2 aliens"). 8 U.S.C. § 1225(b)(2)(A), (B) (excluding B-1 aliens from the definition of B-2 aliens).

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[3] Section 1225(b)(1)(A)(i) refers to aliens who are "inadmissible under § 1182(a)(6)(C) or 1182(a)(7) of this title." Section 1182(a)(6)(C) describes aliens who seek a visa or admission through misrepresentation as inadmissible. Section 1182(a)(7), in turn, deems aliens with no valid entry document inadmissible.

B-1 aliens are subject to mandatory detention and expedited removal. Such aliens "shall be" ordered removed from the United States "without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i). If an alien claims a fear of persecution or seeks asylum, the alien "*shall* be detained pending a final determination of credible fear of persecution." *Id.* at § 1225(b)(1)(B)(iii)(IV) (emphasis added). If the alien fails to establish a credible fear of persecution, the alien "*shall* be detained … until removed." *Id.* (emphasis added). Even if the alien successfully establishes a credible fear of persecution, the alien remains subject to mandatory detention until the asylum claim is finally adjudicated. *See id.* at § 1225(b)(1)(B)(ii) ("[T]he alien *shall be detained for further consideration of the application for asylum*") (emphasis added). Thus, B-1 aliens are subject to mandatory inspection, expedited removal, or detention pending final adjudication of any asylum claim.

Inadmissible B-2 aliens are similarly subject to mandatory detention pending final adjudication of their admissibility. If, upon inspection, an immigration officer determines that a B-2 alien "is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained for a proceeding* under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). Such a proceeding refers to regular removal proceedings before an immigration judge. *See generally* 8 U.S.C. § 1229a (providing for administrative proceedings to adjudicate the

removability of aliens). Accordingly, regardless of whether an alien fall within the B-1 or B-2 class of applicants for admission, the alien is subject to mandatory detention pending a final determination of his or her admissibility or asylum claim. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 837 (2018) ("Read most naturally, §§ 1225(b)(1) and (b)(2) … mandate detention of applicants for admission until certain proceedings have concluded.").

The interlocking provisions of 8 U.S.C. § 1225(a)(1), (a)(3), (b)(1), and (b)(2)(A) provide clear statutory direction to DHS. If an illegal alien is encountered by DHS, an inspection *must* occur, and if that illegal alien is not entitled to be admitted to the United States, he or she *must* be either removed expeditiously, detained pending consideration of an asylum application, or detained and placed in removal proceedings.[4] Any subsequent relief, whether it be

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[4] Congress has only authorized two exceptions to this mandatory detention scheme. First, Congress has granted DHS the authority to return certain aliens "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States … to that territory pending a proceeding under section 1229a of this title," 8 U.S.C. § 1225(b)(2)(C). This discretionary authority permits DHS to return certain aliens to contiguous territory in lieu of mandatory detention. Second, Congress has authorized the DHS Secretary to "parole into the United States temporarily under such conditions as he may prescribe *only on a case-by-case basis* for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A) (emphasis added); *see also Biden v. Texas*, 142 S.Ct. 2528, 2541-44 (2022) (holding that § 1225(b)(2)(C) is discretionary and declining to reach the question of whether the

through asylum, cancellation of removal, or withdrawal of removal, must be authorized by federal statute.

The Final Memorandum violates these statutory provisions on its face by making discretionary (and highly unlikely) the placement of inadmissible aliens into removal proceedings. Although Congress has deemed all aliens present in the United States "who have not been admitted" to be applicants for admission subject to mandatory inspection and detention, the Final Memorandum remarkably 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.

Although the Secretary prioritized for apprehension and removal aliens who are apprehended at the border while attempting to enter the United States unlawfully or who are apprehended in the United States after unlawfully entering after November 1, 2020, enforcement actions even here are made discretionary because "there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement." J.A. 116. If an alien is subject to mandatory detention or removal under 8 U.S.C. § 1225(b) but falls outside the Secretary's border security priority category, only "compelling facts" would "warrant enforcement action" under the Final Memorandum. J.A. 116.

Government is lawfully exercising its § 1182(d)(5) parole authority).

The Final Memorandum thus supplants the clear mandates of federal law that immigration officials detain inadmissible aliens they encounter and place them into removal proceedings. Because Congress has expressly limited petitioners' discretion not to initiate removal proceedings, any "prosecutorial discretion" that they exercise must be consistent with 8 U.S.C. § 1225(b). Since that statute mandates the commencement of removal proceedings, such discretion can only be exercised after such proceedings have been initiated, and only in a manner authorized by law, such as through cancellation of removal or withholding of removal. *See* 8 U.S.C. §§ 1229b, 1231(b)(3). The Final Memorandum replaces this statutory scheme with an incompatible regulatory scheme of its own.

4. The Final Memorandum violates the INA generally.

In addition to violating the specific statutory directives as detailed above, the Final Memorandum effectively annuls large portions of the INA. Under the Final Memorandum, "[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, the Final Memorandum renders every alien defined as *removable* by Congress who is "merely" a removable alien—that is, regarding whom there are no known extra-statutory aggravating circumstances—not merely a low priority for removal, or even a subject of deferred action, but *unremovable*. This regulatory annulment of a legal status imposed by Congress is directly contrary to law.

B. The Final Memorandum violates APA notice-and-comment requirements.

Under the APA, an agency must generally promulgate legislative rules through notice-and-comment procedures. *See* 5 U.S.C. § 553(b), (c). Petitioners contend that the Guidelines established by the Final Memorandum are exempt from notice-and-comment rulemaking as either a general statement of policy or a rule of agency organization, procedure, or practice. *See* 5 U.S.C. § 553(b)(A). As the district court correctly determined, neither exemption applies.

An administrative action that establishes criteria for detaining, removing, or taking any other enforcement action against an illegal alien is quintessentially a "rule" under the Administrative Procedure Act. 5 U.S.C. § 551(4) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").

The Final Memorandum sets forth a process for the determination of future obligations of aliens who are unlawfully present in the United States—including whether they must surrender to detention and whether they will be removed. The district court thus found that the Final Memorandum is binding on agency personnel, and therefore constitutes a substantive rule subject to notice-and-comment procedural requirements under the APA. J.A. 383-88.

The Final Memorandum binds agency personnel by requiring them to consider non-statutory factors prior to engaging in an enforcement action. *Id.* at 384. The Final Memorandum also prevents agency

personnel from taking enforcement actions based solely on the fact that an alien is removable under the INA, whether an alien's removability is due to a criminal conviction or mere unlawful presence. *Id.* at 384.

The INA establishes the powers of immigration officers, which include the authority to take certain actions without warrant, to administer oaths and take evidence, and to detain aliens in specified situations. *See* 8 U.S.C. § 1357. The Final Memorandum, however, limits the authority of immigration officers to take *any* enforcement actions by requiring such officers to consider and justify any enforcement actions based upon non-statutory factors. In short, the Final Memorandum deprives immigration officers of the discretion to follow the plain enforcement directives in the INA. Because the Final Memorandum binds agency personnel, it cannot be a statement of general policy exempt from the rulemaking procedures of the APA.

In addition, the district court properly concluded that the Final Memorandum is not a rule of agency organization, procedure, or practice that is exempt from notice-and-comment rulemaking because it modifies the substantive rights of aliens present unlawfully in the United States. J.A. 386-88. The Final Memorandum "modifies the substantive rights and interests of criminal aliens as demonstrated by the significant decrease in ICE's detention of aliens with criminal convictions under the Final Memorandum and its precursors." *Id.* at 387-88 (citing Findings of Fact Nos. 92 & 102 at J.A. 314, 317). Because the Final Memorandum has a substantial

impact on the regulated class of aliens, it is a rule that should have been promulgated with public participation, and was not subject to the exception to notice-and-comment procedures under 5 U.S.C. § 553(b)(A).

C. The Final Memorandum violates the Constitution.

Unconstitutional agency action or inaction violates the APA, *see* 5 U.S.C. § 706, and can be enjoined on that basis.[5]

The 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, the Final Memorandum makes every alien defined as *removable* by Congress who is "merely" a removable alien—that is, an alien

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[5] Violations of the Take Care Clause, however, are also actionable independently of the APA, and this Court can enjoin petitioners' violations of their Take Care obligations under the Court's inherent equitable powers. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327-28 (2015) (discussing "a long history of judicial review of illegal executive action, tracing back to England"); *Davis v. Passman*, 442 U.S. 228, 241-44 (1979) (holding that the Constitution itself, coupled with 28 U.S.C. § 1331, provides a cause of action to challenge federal officials who violate the Constitution). The Constitution, moreover, permits anyone with standing to raise equitable claims (and seek injunctive relief) against federal officers who act unconstitutionally. *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 698-99 (1949); *cf. Ex parte Young*, 209 U.S. 123 (1908). Thus, even if Movants' claims fail under the APA, the Take Care Clause provides an independent cause of action to challenge petitioners' nonenforcement policies.

regarding whom there are no known non-statutory aggravating circumstances—not merely a low priority for removal, or even a subject of deferred action, but actually *unremovable*. This outright erasure by petitioners of the legal status of removability imposed by Congress constitutes no mere garden-variety failure to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, but both an abdication of statutory responsibilities and an executive suspension of the law.

It is this Court's duty to decide whether Executive actions comply with the relevant statutory requirements. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952) ("It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being….") (Frankfurter, J., concurring). As Justice Jackson stated in *Youngstown*:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Id. at 655 (Jackson, J., concurring). Justice Jackson put *Youngstown* within a "judicial tradition" beginning with Chief Justice Coke's admonishing his sovereign that "[the King] is under God and the Law."

Id. at 655 n.27 (interior quotation marks omitted). By framing the Take Care Clause as a duty, the Framers rejected the idea that the Executive should be vested with the power to suspend or dispense with laws enacted by Congress, and this Court has not only the authority under the Constitution to decide this question, but the duty to do so. *See Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.").

In *Texas v. Biden*, the Fifth Circuit recounted how the "take care" clause of the Constitution, Art. II, sec. 3, derived from the prohibition in the English Bill of Rights against the English kings' prerogatives to suspend or dispense with the laws. 20 F.4th 928, 978-82 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528 (2022). As the Fifth Circuit observed, agency rules are judicially reviewable because "the English Bill of Rights, followed by the Constitution, explicitly forbade the executive from nullifying whole statutes by refusing to enforce them on a *generalized* and *prospective* basis." *Id.* at 983 (emphasis in original).

> Congress *can* rebut the common-law presumption that nonenforcement discretion is unreviewable. Specifically, "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." [*Heckler*, 470 U.S.] at 832-33. In other words, the executive *cannot* look at a

> statute, recognize that the statute is telling it to enforce the law in a particular way or against a particular entity, and tell Congress to pound sand. So *Heckler* expressly embraces the common law's condemnation of the dispensing power. … Moreover, the Court emphasized that nothing in the *Heckler* opinion should be construed to let an agency "consciously and expressly adopt[] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4 (quotation omitted). This, of course, is a condemnation of the suspending power.

Id. at 982 (emphases in original).

Here, Congress directed DHS to enforce the immigration laws in specific ways (mandatory detention and initiation of removal proceedings) against specific classes of individuals (inadmissible applicants for admission, certain criminal aliens, and aliens ordered removed). Insofar as the Final Memorandum prevents immigration officers from enforcing the detention and removal mandates specified by Congress, it violates the prohibition against dispensing with the law. And, because the Final Memorandum announces DHS's intention not to enforce a specific aspect of the law against a large class of removable aliens prospectively, the Final Memorandum violates the prohibition against suspending the law. Either way, the conscious, express policy of non-enforcement (or mis-

enforcement) here is easily "extreme" enough to amount to "abdication" and a true failure to take care. *Heckler*, 470 U.S. at 833 n.4.

II. INJUNCTIVE RELIEF IS WARRANTED.

According to well-established principles of equity, a plaintiff seeking a permanent injunction must demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006), *abrogated in part on other grounds*, PUB. L. NO. 116-260, § 226, 134 Stat. 1182, 2208 (2020). Each part of this four-part test is met here.

A. Movants suffer irreparable harm.

An injury is irreparable if it cannot be adequately compensated by an award of damages. *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464, 472-73 (5th Cir. 1985). As an aspect of that rule, courts may enjoin government officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected [by] an unconstitutional act, violating

the Federal Constitution." *Morales v. TWA,* 504 U.S. 374, 381 (1992).

The injuries to Movant sheriffs and counties are irreparable. The costs of detaining illegal aliens who commit local crimes and investigating those crimes go far beyond financial costs. The crisis created by the enforcement practices attributable to the Final Memorandum has also interfered with all of the other law-enforcement duties that Movant sheriffs must perform. The officers and the detention capacity simply are not available to perform the routine law-enforcement actions that local law enforcement would otherwise be taking. Even if damages equal to the net fiscal cost that Movants have been forced to bear could be recovered from petitioners in the future,[6] many

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[6] In fact, however, sovereign immunity precludes money damages here, making Movants' monetary injuries irreparable. When the defendant's sovereign immunity deprives the plaintiff of the ability to recover damages, the "lack of a 'guarantee of eventual recovery' is another reason that its alleged harm is irreparable." *Wages & White Lion Invs., L.L.C. v. United States FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (citing *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021)); *accord Hillhaven Corp. v. Wisconsin Dep't of Health & Soc. Servs.*, 733 F.2d 1224, 1226 (7th Cir. 1984); *Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, ... the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."); *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008) ("[i]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury").

aspects of the immediate injury could not be repaired. So, for example, if the high cost to a county of incarcerating illegal alien offenders means that the sheriff's office cannot hire another deputy that year, future recovery of damages would not repair the county's injury of having one fewer deputy protecting the county's residents.

FPF's injury is also irreparable. It must divert limited financial resources, not recoverable at law, because of the need to inform and advise ICE officers concerning their legal options under the Final Memorandum.

In addition, the injury to the careers of ICE officer members of the Foundation who seek only to follow federal law, caused by unjust disciplinary action up to and including termination, is harm of an irreparable nature. Just as, for example, dollar values cannot easily be assigned to a company's loss of clientele, goodwill, marketing techniques, or office stability, *Martin v. Linen Systems for Hospitals, Inc.*, 671 S.W.2d 706, 710 (Tex. Ct. App. 1984), neither can the harm to ICE officers' careers as law enforcement officers from having been disciplined for resisting the policies set forth in the Final Memorandum be remedied by back pay for a suspension shorter than the threshold for administrative review under the Civil Service Reform Act.

B. Movants lack an adequate alternate remedy.

Only injunctive relief can cure the unlawful policies in the Final Memorandum. Though *vacatur* would redress respondents' and Movants' injuries to a

limited extent by voiding that memorandum, 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 memorandum.

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*, 415 U.S. at 471 (interior quotation marks and citations omitted).

C. Movants' injuries outweigh petitioners' purported injuries.

In contrast to the considerable, irreparable, and immediate harm that implementation of the Final Memorandum inflicts upon Movants, petitioners can claim no injury that would result from enjoining the policies in it. Petitioners can assert no national

interest in refusing to detain or remove illegal aliens because Congress itself discounted any such national interest when it enacted the statutes that petitioners are directly violating.

Nor can petitioners claim that they lack the detention capacity to comply with the requirements of the federal laws at issue in this case. As the district court found, "the Government has not acted in good faith" regarding its "insufficient resources and limited detention capacity." J.A. 358-59. And while "blam[ing] Congress for [its] deficiency" in detention space, petitioners have "persistently underutilized existing detention facilities," *Id.* 359, and have "submitted two budget requests in which [they] ask[] Congress to cut those very resources and capacity by 26%." *Id.* at 358.

D. Injunctive relief is in the public interest.

The grant of injunctive relief in this matter would serve four significant public interests. First, there is an immense public interest in the enforcement of the immigration laws of the United States. This is specifically true where Congress has already weighed the public interest in imposing mandatory detention and removal requirements against any competing interests by enacting 8 U.S.C. §§ 1225(b), 1226(c), and 1231(a). The executive branch's defiance of federal law is, by its very nature, a matter of immense public interest. "If the Secretary were to declare that he no longer would enforce [a particular law]" such a case "inevitably would be a matter of grave public concern." *Dunlop*, 421 U.S. at 574. Requiring the government to follow the law is public interest enough.

But the challenged policies also expose lawful residents to heightened crime, particularly in counties such as Movants where local law enforcement has been stretched so thin that it cannot adequately respond to the surge in crime. In Kinney County, for example, 180 illegal aliens were arrested for various crimes in 2020, but that number grew to 1,121 in 2021 and to 2,468 so far in 2022. Coe Decl. ¶ 9 (App. 68a-69a). Every day that passes is another day in which criminal aliens who evaded detention or removal because of the Final Memorandum have the opportunity to commit additional crimes.

Finally, the Final Memorandum has forced DHS officers to stand down, reducing removals to a fraction of their prior levels. And lax enforcement draws even higher levels of illegal immigration. These twin factors have compounded the border crisis that is unfolding in Texas and other States due to the challenged policies. Here, petitioners are not only declining to enforce federal immigration laws against illegal aliens; they are also ordering immigration officers themselves to violate the requirements of federal law.

Injunctive relief would plainly serve the public interest, because only enforcement of the immigration laws can lead to a reduction in the magnitude of the border crisis.

CONCLUSION

Injunctive relief would plainly serve the public interest, because only enforcement of the immigration laws can lead to a reduction in the magnitude of the border crisis.

Dated: October 25, 2022 Respectfully submitted,

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