No. 22-58

IN THE

Supreme Court of the United States

UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

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

BRIEF OF ADMINISTRATIVE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in Appendix A are professors who teach and research administrative law. *Amici* have an interest in the proper construction and application of the Administrative Procedure Act ("APA") and in the role that federal courts and agencies play in advancing or hindering reasoned policymaking, democratic accountability, and good governance. *Amici* express no view about the wisdom of the Department of Homeland Security's ("DHS") September 30, 2021, Guidelines for the Enforcement of Civil Immigration Law ("Mayorkas Memo"). They write to address why, as a matter of fundamental administrative law doctrines and principles, the Mayorkas Memo is not subject to the APA's notice-and-comment requirement under 5 U.S.C. § 553(b). *Amici* share a concern that the Fifth Circuit's determination that DHS was required to present the Mayorkas Memo for notice and comment has dangerous implications for the integrity of administrative law and the functioning of administrative agencies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Executive Branch has, and needs, the ability to issue guidelines informing the public of agency priorities and resource utilization. That power is essential to an efficient, effective, and responsive federal public administration. Its absence would severely hinder agencies' ability to fulfill their statutory duties and to implement the Executive Branch's policies. Here, the Fifth Circuit's ruling, if affirmed, would undermine the goals of the APA, impose steep bureaucratic and procedural costs,

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation and submission. All parties have provided blanket consent to *amicus* filings on the docket.

and hinder agencies' ability to respond promptly to pressing issues by requiring a protracted notice-and-comment period that historically has almost never been imposed on agencies announcing prospective policy initiatives or enforcement priorities.

The Mayorkas Memo at issue is a September 2021 set of policy "guidelines" issued by DHS. The Mayorkas Memo guides line-duty personnel to exercise their "discretion and focus [DHS's] enforcement resources in a more targeted way" to prioritize removal of noncitizens "who pose a threat to national security, public safety, and border security and thus threaten America's well-being." (App. 112–113.) In other words, the Memo sets enforcement priorities.

In establishing those priorities, the Mayorkas Memo discusses DHS's resource constraints and the "more than 11 million undocumented or otherwise removable noncitizens in the United States" and resolves that DHS "need[s] to exercise [its] discretion and determine whom to prioritize for immigration enforcement action" in a more targeted way. (App. 112.) The Mayorkas Memo confirms that line-duty personnel retain discretion to initiate and carry out removal actions as they see fit, stating that it "does not compel an action to be taken or not taken [and instead] the guidance leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel." (App. 118.) The Mayorkas Memo does "not lessen [DHS's] commitment to enforce immigration law to the best of [its] ability"; on the contrary, its policies are designed to allow DHS to "use the resources [it has] in a way that accomplishes [its] enforcement mission most effectively and justly." (App. 113.)

The Fifth Circuit deemed the Mayorkas Memo "procedurally invalid," deciding it was not "merely a 'policy

statement'" and instead was "binding" because it purportedly "remov[ed] DHS personnel's discretion to stray from the guidance or take enforcement action against an alien on the basis of a conviction alone." (App. 484.) The Fifth Circuit concluded that the Mayorkas Memo "is much more substantive than a general statement of policy and, as such, it had to undergo notice and comment procedures." (*Id*.)

The Fifth Circuit's decision, at least insofar as it concerns notice-and-comment requirements under the APA, is both legally unsupportable and ill-advised. It is at odds with the APA's text, fundamental principles of administrative law, multiple decisions of this Court, and unbroken historical agency practice. The decision, if allowed to stand, would (i) incentivize agency heads to forego informing the public about the agency's priorities altogether, or (ii) entangle agencies seeking to announce policy guidance or enforcement priorities in the time-consuming process of notice and comment, a process that until now has virtually always been reserved for "legislative" rules—agency pronouncements that create or take away a party's legal rights. Both results are directly contrary to the goals underpinning the APA.

The APA's text and DHS's historical practices confirm that DHS was not required to engage in notice and comment before issuing the Mayorkas Memo for three primary reasons:

First, the APA expressly states that the notice-and-comment requirement "does not apply" when agency "rule making" involves only "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice[.]" 5 U.S.C. § 553(b)(3)(A). "[G]eneral statements of policy" "advise the public prospectively of the manner in which the agency proposes

to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (internal quotation marks and citation omitted). The Mayorkas Memo falls squarely within this exception to the notice-and-comment requirement. *See Arizona v. Biden*, 40 F.4th 375, 393 (6th Cir. 2022) (determining that notice and comment was not required for the Mayorkas Memo because "[t]he Guidance 'does not compel' any action, 'leaves the exercise of prosecutorial discretion to the judgment of' federal personnel, and does not create any 'right or benefit . . . enforceable at law.' It does not bear the hallmarks of a substantive rule because it does not legally 'affect[ ] individual rights and obligations.'" (internal citation omitted) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979))).

Second, administrations from both parties have issued policy guidelines to inform the public of resource allocation and enforcement priorities for civil immigration laws. To *amici's* knowledge, none of the dozens of similar memoranda issued by DHS since enactment of the APA in 1946 have been subject to notice and comment. That historical practice comports with the APA's text and purpose: Prospective policy statements, such as enforcement priority memoranda, are expressly exempted from the APA's notice-and-comment requirements. 5 U.S.C. § 553(b)(3). The Fifth Circuit's decision deviates from historical practice and hinders DHS's ability to fulfill its statutory duties in an efficient and effective manner.

Third, if the Fifth Circuit's ruling regarding notice and comment were correct, then not only were DHS's prior enforcement policies invalid, but scores of other agency documents from across the Executive Branch would be in jeopardy. From enforcement manuals issued by the Department of Justice or the Securities and Exchange Commission to "most wanted" lists issued by the National

Transportation Safety Board, agencies would have to engage in a time-consuming and resource-intensive notice-and-comment period before it could inform the public of its policy priorities. This would exponentially increase the costs of informing the public; give agency heads perverse incentives to avoid publishing policy guidance at all; and lead to less, not more, transparency—all in direct contravention of the policies expressed in the APA. *See Am. Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) ("The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for 'interpretive rule' so narrowly as to drive agencies into pure ad hocery—an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties.").[2]

This Court should reverse the Fifth Circuit's erroneous decision.

ARGUMENT

The APA was enacted to provide a uniform system for the public to be informed about agency rulemaking. To facilitate, rather than hinder, agencies' abilities to carry out their statutory duties in a transparent manner, the APA set forth a two-track system under which an agency could inform the public regarding how it will carry out its mandate.

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[2] The language of the court in *American Mining* refers to interpretive rules, but the logic of its argument applies equally to policy statements. *See* Administrative Conference of the United States ("ACUS") Recommendation 2019-1, Agency Guidance Through Interpretive Rules, 84 Fed. Reg. 38,927, 39,828 (Aug. 8, 2019) ("Policy statements and interpretive rules are similar in that they lack the force of law and are often issued without notice-and-comment proceedings, as the APA permits." (citations omitted)); Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 263, 346–53 (2018).

On the one hand, an agency could issue *inter alia* a "general statement of policy" by publication in the Federal Register, 5 U.S.C. § 552(a)(1)(D), but such a statement would not be binding on private parties. On the other hand, agencies could engage in a fulsome notice-and-comment process to issue a "legislative rule." A legislative rule is required to undergo a notice-and-comment process and the resulting rule has the effect of law and is binding on private parties. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (stating that the key defining feature of legislative rules—those rules that require notice and comment—is that they "bind private parties" with the "force and effect of law" (citation omitted)).

The distinction is stark and the difference matters: Statements of policy and other non-legislative rules may bind agency personnel and inform the public of the Executive Branch's policy priorities, but they do *not* have the force of law and cannot be used to grant or take away anyone's legal rights. *E.g.*, *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986) ("A general statement of policy … does not establish a 'binding norm.' [and instead] announces the agency's tentative intentions for the future").

The Mayorkas Memo lands squarely on the side of a policy statement and is thus exempt from the notice-and-comment requirement under the APA. The Mayorkas Memo explicitly states that it is simply a set of "guidelines" to inform "the exercise of prosecutorial discretion," (App. 111–112), and has every "hallmark" of a "general statement of policy," *Arizona*, 40 F.4th at 393. Unlike a legislative rule that would require notice-and-comment, by its terms the Mayorkas Memo "is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter."

(App. 120.) As such, it can hardly be said to provide any private party with a legal right. The Mayorkas Memo is the paradigmatic non-legislative rule that is expressly exempted from notice and comment. 5 U.S.C. § 553(b)(3)(A); *Kisor*, 139 S. Ct. at 2420. Accordingly, the APA did not require DHS to engage in a notice-and-comment process before issuing the Mayorkas Memo to agency personnel.

I. The Mayorkas Memo Is Exempt From Notice-and-Comment Requirements Under The Express Terms Of The APA.

The APA establishes the procedures that federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule[.]" 5 U.S.C. § 551(5). The APA distinguishes between two types of rules: "Legislative rules" are issued through notice-and-comment rulemaking, *see id.* §§ 553(b), (c), and have the "force and effect of law," *Chrysler Corp.*, 441 U.S. at 302–03 (citation omitted). Non-legislative rules, such as "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice[,]" 5 U.S.C. § 553(b)(3)(A), by contrast, do not require notice-and-comment rulemaking, and "do not have the force and effect of law," *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995). This dichotomy between legislative and non-legislative rules is "[t]he central distinction among agency regulations found in the APA." *Lincoln*, 508 U.S. at 196 (quoting *Chrysler Corp.,* 441 U.S. at 301).

The APA's drafters exempted policy statements and other non-legislative rules from notice and comment for the straightforward reason that they wanted "to encourage the making of such rules." S. Comm. on the Judiciary, Administrative Procedure Act: Legislative History ("Judiciary Committee Print"), S. Doc. No. 79-248, at 18 (2d

Sess. 1946). Encouraging agencies to issue official statements of agency policy, such as the guidelines at issue here, was intended to further the APA's fundamental objective of ensuring that the public was informed of agency policy. *See* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin L. Rev. 803, 804–12 (2001) ("Strauss 2001"); *see also* Levin, *supra*, at 263, 276 (noting that scholars have "spoken up in support of agency guidance and its utility").

Indeed, the APA was enacted to require agencies "to take the mystery out of administrative procedure by stating it." S. Rep. No. 79-752, at 198 (1945). That objective is expressed in section 3(a) of the APA, 5 U.S.C. § 552(a), which requires agencies to publish both legislative and non-legislative rules on the "theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know . . . with definiteness and assurance." S. Rep. No. 79-752, at 198. The "public information requirements of section 3 are in many ways among the most important, far-reaching, and useful provisions of the bill." *Id*.

Recognizing both the need for agencies to engage in non-legislative rulemaking (*i.e.*, issuing general statements of policy) and the burdens of the notice-and-comment process, the APA mandated no particular procedures for an agency's adoption of non-legislative rules and instead left such matters to the agency's discretion. *E.g.*, S. Rep. No. 79-752, at 200 (noting that the APA gives the agency "discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules, general statements of policy, or rules of agency organization, procedure or practice"); *Kisor*, 139 S. Ct. at 2434 (Gorsuch, J., concurring) (stating that an agency can

announce non-legislative rules "without advance warning and in pretty much whatever form it chooses"). In fact, Congress expressly exempted such "statements of policy" from the requirement that agencies provide the public with 30 days' notice prior to the rule going into effect, 5 U.S.C. § 553(d)(2), yet another indication that the APA's framers intended that this kind of agency guidance would be available to both guide the agency's line-duty personnel and inform the public of agency priorities without delay.

Congress's decision to exempt policy statements and other non-legislative rules from notice and comment, coupled with the decision to waive the 30-day effective-date requirement, encourages their public dissemination and thus advances the APA's objectives of facilitating an efficient and transparent federal public administration. As a result, secret rulemaking and adjudication is intended to be limited if not altogether eliminated. Judiciary Committee Print, S. Doc. No. 79-248, at 18; Strauss 2001, *supra*, at 804–12.

This Court has expressly held that courts cannot impose on agencies procedural requirements beyond those mandated by the APA. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.'"); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (stating that section 4 of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures"). Judicial restraint is imperative because anything else would violate "the very basic tenet of administrative law that agencies should be free to fashion

their own rules of procedure." *Vt. Yankee*, 435 U.S. at 544; *Perez*, 575 U.S. at 102 (same).[3]

A. As A "General Statement Of Policy," The Mayorkas Memo Is Exempt From Notice-and-Comment Requirements.

The Court has described "general statements of policy" under 5 U.S.C. § 553(b) to include those "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197 (citation omitted). That description derives from the United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act*, at 30 n.3 (1947) ("AG's Manual"), to which the Court has often turned for insight into the APA's meaning. *E.g.*, *Vt. Yankee*, 435 U.S. at 546. *Lincoln*'s definition reflects the contemporaneous understanding of the role of policy statements shared by those actively involved in developing the APA and thus

[3] Although exceedingly rare, some courts have incorrectly imposed additional requirements on agencies issuing guidance. Such decisions have been sharply criticized by commentors and, more importantly, not endorsed by this Court. *See, e.g.*, *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946–47 (D.C. Cir. 1987) (concluding that FDA's regulation of "action levels" informing food producers of allowable levels of unavoidable contaminants were "legislative rules and thus subject to the notice-and-comment requirements"). Decisions that require agencies to go through a notice-and-comment process before issuing guidance documents introduce "an expensive and time-consuming process that often encourages litigation and discourages agency activity" and consequently these decisions have been harshly criticized for "produc[ing] a rule of potentially perverse consequences" that "creat[es] incentives for a more erratic and undisciplined approach to an agency's own exercise of its prosecutorial discretion[.]" Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 Admin. L. Rev. 131, 147–48, 150–52 (1992).

unsurprisingly tracks precisely and appropriately the APA's objective of securing the benefits of transparent administration by encouraging agencies to promulgate such policy statements. *See Pac. Gas & Elec. Co. v. Fed. Power Comm'n,* 506 F.2d 33, 38 (D.C. Cir. 1974) (general statements of policy as defined in the AG's Manual have the "beneficial functions" of encouraging "public dissemination of the agency's policies prior to their actual application," ensuring its views "do not remain secret" and thus "facilitat[ing] long range planning within the regulated industry" and "uniformity in areas of national concern").

As the Sixth Circuit recently concluded, the Mayorkas Memo is exempt from the APA's notice-and-comment provisions because it is a general statement of policy. *Arizona*, 40 F.4th at 393. Guidance setting forth the agency's priorities for the exercise of prosecutorial discretion lies at the heart of the APA's exemption for such policy statements. *Lincoln,* 508 U.S. at 197; *see Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.) (identifying "agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule" as the paradigm case of a "general statement of policy").

The Mayorkas Memo is exempt from notice-and-comment requirements under 5 U.S.C. § 553(b) because, like the myriad INS and DHS memos addressing priorities in immigration enforcement that came before it, *see infra* at II, it sets out the agency's policy priorities in the context of exercising its prosecutorial discretion. The Mayorkas Memo describes the categories of persons the agency will prioritize for removal (App. 111–112); discusses factors in making the discretionary decision to commence removal

proceedings (*e.g.*, App. 113–115); and addresses the need for training, supervision, and review procedures to ensure effective implementation of these policy priorities through the geographically dispersed offices that make up DHS. (App. 118.) The Mayorkas Memo does not purport to "bind any private party" and disclaims any legal effect on "individual rights and obligations." (App. 120.) Rather, the Mayorkas Memo expressly states that it does not create "any right or benefit, substantive or procedural, enforceable at law by any party[.]" (*Id*.) It thus lacks all indicia of a legislative rule and, accordingly, is not required to proceed through a notice-and-comment period. *See Kisor*, 139 S. Ct. at 2420.

B. The Fifth Circuit Erred In Holding That A General Statement Of Policy Must Leave Lower-Level Agency Employees "Free To Exercise Discretion."

The Fifth Circuit considered itself constrained by its own erroneous precedent in *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), which held that an agency must subject a policy statement—a non-legislative rule per the terms of the APA, 5 U.S.C. § 553(b)(3)—to notice and comment unless the statement "genuinely leaves the agency *and its decision-makers* free to exercise discretion."[4] (App. 484–486 (emphasis added).) Under that misguided approach, the Fifth Circuit concluded that

[4] The Fifth Circuit's 2015 *Texas v. United States* holding is inconsistent with its own precedent, which has found that policy statements such as the Mayorkas Memo are not subject to notice-and-comment requirements. *See, e.g.*, *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 600 (5th Cir. 1995) (holding that FDA's "compliance policy guide" was not subject to notice and comment and noting that "all statements of policy channel discretion to some degree—indeed, that is their purpose").

the Mayorkas Memo was not an exempt policy statement because it had "remov[ed] DHS personnel's discretion to stray from the guidance or take enforcement action against an alien on the basis of a conviction alone." (*Id*.)

Setting aside the reality that the Mayorkas Memo specifically *preserves* the discretion of DHS personnel in removal decisions (as the Sixth Circuit recognized in *Arizona*), the Fifth Circuit's rule that policy statements may not limit the discretion of lower-level personnel misapprehends the APA's policy-statement exemption. Peter M. Shane, *Faithful Nonexecution*, 29 Cornell J. L. & Pub. Pol'y 405, 454–55 (2019) (noting that guidance documents that are not subject to notice and comment "reserve case-by-case discretion at least for high-level agency decision makers, while setting a preferred direction for front-line decision makers implementing a particular statutory responsibility"). The APA is concerned with "general statements of policy" primarily *because* those statements limit the discretion of lower-level officials and thus are statements on which the public can meaningfully rely to conform line-duty personnel's conduct or call officials to account. The Fifth Circuit's narrow interpretation of the policy-statement exemption has no basis in this Court's decisions or in the text, purpose, or implementation of the APA. To the contrary, as explained below, this approach misunderstands two fundamental points about general statements of agency policy.[5]

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[5] This problem is amplified by the Fifth Circuit's decision to endorse a "universal" remedy of issuing a nationwide injunction barring the federal government from enforcing such guidance documents in any

First, as a general matter, agencies issue policy statements for the *purpose* of channeling the discretion of lower-level officials. In fact, some agencies are mandated to do so by statute, a requirement supported by the Constitution's structure that directs the Executive Branch to faithfully administer the laws. Such policy statements are not subject to notice and comment even if they limit the discretion of lower-level officials. *See, e.g.*, Levin, *supra*, at 303 (endorsing the position that the "APA does not require notice and comment for guidance that binds lower-level agency officials, and courts should not read it as such"). *A fortiori*, the Mayorkas Memo, which expressly confirms the discretion placed in the hands of lower-level agency personnel, does not run afoul of the notice-and-comment requirements of the APA.

Second, under the APA, the public interest served by encouraging agencies to issue policy statements lies chiefly in the fact that those statements are binding on lower-level officials, so that the public can shape their expectations and conduct accordingly. Anything else would lead to less agency political accountability, less uniformity, and less transparent agency action.

State in the country, thereby ensuring that agency priorities cannot be formally disseminated to lower-level personnel absent notice-and-comment rulemaking. *Amici* do not express an opinion on the wisdom or validity of "universal" remedies other than to note that the issues inherent in the Fifth Circuit's decision regarding notice and comment (and the APA more generally) are all the more troubling if challengers can sidestep the APA and subject all agency action to these additional procedural requirements and receive a nationwide remedy by strategically filing suit in the Fifth Circuit. *Cf. Perez*, 575 U.S. at 102 ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.'" (citation omitted)).

1. Discretion Ultimately Lies With Agency Heads.

Agency heads can, and many times should, bind lower-level officials through policy statements that are not subject to a notice-and-comment process.

In an agency's typical structure, the enabling statute vests the head of the agency with discretion to make policy on behalf of the Executive Branch. Here, for example, Congress has charged the Secretary of DHS to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority[.]" 8 U.S.C. § 1103(a)(3). The role of lower-level agency staff in such a structure is to implement the Secretary's policy decisions under the Secretary's supervision. *E.g.*, *id.* § 1103(a)(2) (stating that the Secretary of DHS "shall . . . control, direct[], and supervis[e] all employees" in the agency); *id*. § 1103(a)(4) (stating that the Secretary of DHS "may require or authorize any employee of the Service . . . to perform or exercise any of the powers, privileges, or duties conferred or imposed by" statute or regulation).

This hierarchical structure has its foundation in the Constitution itself, which mandates a system of supervision to assure that the Executive Branch faithfully executes the law. U.S. Const. art. II, § 3. The Constitution requires that the President "shall take Care that the Laws be faithfully executed," and the President supervises agency heads and other inferior officers in the execution of this power. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1875–79 (2015). Indeed, Congress rarely delegates authority to the President directly and instead prefers to directly delegate responsibility to agency heads. The manner in which the Constitution and statutes delegate authority "imply a

hierarchical structure for federal administration, under which lower government officials act subject to higher-level superintendence." *Id.* at 1879. Contrary to the Fifth Circuit's misinterpretation of the policy-statement exemption, this hierarchical structure is essential to the faithful execution of the laws. *See id*.

In enacting the APA, Congress recognized the value of permitting an agency head to issue binding policy guidance to lower-level officials without undergoing notice and comment. *See* Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 77-8, at 23 (1st Sess. 1941) ("AG's Committee Final Report"); *see also, e.g.*, Judiciary Committee Print, S. Doc. No. 79-248, at 11, 18 (discussing AG's Committee Final Report). The AG's Committee Final Report emphasized the need for agency heads to delegate responsibility while maintaining "[s]upervision and control." AG's Committee Final Report at 23. To that end, the Report recommended that the necessary supervision should be effected first by "stating for the guidance of agency officials those policies which have been crystallized, and which the responsible officers need only apply to the particular case at hand." *Id*.[6]

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[6] The APA's drafters understood "general statements of policy" to include internally binding guidance documents like the Mayorkas Memo. In the AG's Committee Final Report, having already discussed policy statements as the means to supervise and control the discretion of lower-level officials, the Committee revisited that topic to urge that agencies should be required to publish "[s]tatements of general policy" and other non-legislative rules. AG's Committee Final Report at 26–27. The Committee opined that publishing these policy statements was particularly valuable to the public where the statements provided

Agencies have long understood this principle. *See, e.g.*, Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3437 (Jan. 25, 2007) (recognizing that "while a guidance document cannot legally bind, *agencies can appropriately bind their employees to abide by agency policy* as a matter of their supervisory powers over such employees *without undertaking pre-adoption notice and comment rulemaking*" (emphases added)).[7]

2. Constraining Line-Duty Officers' Discretion Is A Valuable Feature Of Policy Statements.

General statements of policy are valuable for the very reason that they constrain the discretion of lower-level personnel and, accordingly, increase agency-wide political accountability and transparency.

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authoritative guidance to agency officials. *Id.* at 27 (when "the policies of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication" (citation omitted)).

[7] Similarly, the Administrative Conference of the United States (a body authorized by 5 U.S.C. § 594(1)), issued a report in 1992 explaining that an agency may issue "a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence[,]" and such "management directives" are "encouraged . . . as a means to regularize employee action that directly affects the public." ACUS, Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,103, 30,104 (July 8, 1992). In 2017, when updating its recommendations to Congress, ACUS again noted that it is "appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with a policy statement." ACUS Recommendation 2017-5, Agency Guidance Through Policy Statements, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017).

Encouraging agencies to develop internally binding policy guidance serves the APA's basic objective of promoting predictable, transparent, and more accountable agency action. *See generally*, Strauss 2001, *supra*, at 808; Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise, § 19.3 (6th ed. 2022). The value of requiring an agency to disclose a policy depends substantially on whether that policy is authoritative and binding. If policies are binding on lower-level personnel, stakeholders can conform their conduct accordingly, and the public can rightly set expectations on the agencies' performance. *See* S. Rep. No. 79-752, at 198. If, on the other hand, the guidelines are not binding, then their publication will do nothing to dispel the "mystery" around the actual decision making of agency officials, or to promote uniformity and predictability in those decisions. *See id*.

Authoritative internal supervision is also critical to ensure that agencies remain accountable to the Executive Branch, to Congress, and ultimately to the public. Metzger, *supra*, at 1892–93 (publishing non-legislative rules can ensure "that policies and priorities specified by elected leaders are actually carried out on the ground"); *see Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (emphasizing that political accountability for administrative action requires a "clear and effective chain of command" from the President to unelected lower-level officials).

Providing reliable information about how laws are being executed and funds expended aids both Executive Branch and Congressional oversight of agency action. That same transparency allows for meaningful public oversight and engagement. An informed public can seek to change policies with which it disagrees. *See* Metzger, *supra*, at 1893; Hickman & Pierce, *supra*, § 19.3 (noting that when agencies' non-legislative rules are accessible to the public

"they can use that knowledge as the basis for decisions either to act in accordance with the agency's policies or to attempt to change those policies").

Contrary to the APA and its framing, under the Fifth Circuit's errant approach agency heads would no longer be able to bind lower-level personnel—a crucial aspect of a well-functioning public administration system—absent engaging in a lengthy, costly, and unnecessary notice-and-comment process.

II. Historically, DHS Priority Policies Have Been Excluded From Notice And Comment Under 5 U.S.C. § 553(b).

For decades, under administrations from both political parties, the Secretary of the DHS (and the head of its predecessor agency, the Immigration and Naturalization Service in the Department of Justice) has exercised the statutory authority to "[e]stablish[] national immigration enforcement policies and priorities" by issuing memoranda that prioritize the removal of particular noncitizens.[8] 6 U.S.C. § 202(5). "Because—like other law enforcement agencies—the INS does not have the resources fully and completely to enforce the immigration laws against every violator, it exercises prosecutorial discretion thousands of times every day." Memorandum from Bo Cooper, INS General Counsel, *INS Exercise of*

[8] Immigration authorities have used guidelines like the Mayorkas Memo to announce agency policy since long before the enactment of the APA in 1946. *See, e.g.*, Dep't of Justice, *Circular Letter No. 107* (Sept. 20, 1909) (detailing prosecutorial discretion policy that immigration officers would not have good cause to institute proceedings to cancel fraudulent or illegally procured naturalization certificates "unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country").

Prosecutorial Discretion (July 11, 2000) ("2000 Cooper Memo") at 3.[9]

To *amici*'s knowledge, prior to the Fifth Circuit's erroneous decision notice and comment has *never* been undertaken or required when DHS set forth policy guidelines regarding enforcement priorities such as the Mayorkas Memo. *See Arizona*, 40 F.4th at 382, 393 (discussing six DHS memoranda from 2000 to 2017 "similar" to the Mayorkas Memo and ultimately concluding that DHS was not required to complete a notice-and-comment process before issuing the Mayorkas Memo); 2000 Cooper Memo at 8 (clarifying that "enforcement priorities that focus [DHS] prosecutorial resources where they will do the most good . . . are not legally codified and binding substantive law—*nor are they required to be under the APA*" (emphasis added)); *see also* Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 98 (ABA, 6th ed. 2018) (stating that courts routinely "find that rebuttable presumptions leave an agency free to exercise its own discretion and may therefore properly be announced in policy statements"); *Broadgate, Inc. v. U.S. Citizenship & Immigr. Servs.*, 730 F. Supp. 2d 240, 246 (D.D.C. 2010) (holding that a USCIS policy memorandum outlining factors used to determine whether an employer's job qualifies under a visa program did not constitute a legislative rule and thus was not subject to notice and comment).[10] To the contrary, throughout its history DHS has repeatedly issued guidelines that resemble the

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[9] https://www.shusterman.com/pdf/prosecutorialdiscretiomemo cooper.pdf.

[10] Regarding the importance of guidance documents in immigration law, *see* Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules,* 47 U. Mich. J.L. Reform 1 (2013).

Mayorkas Memo and *never* engaged in the notice-and-comment process that the Fifth Circuit now insists is mandatory.[11] These prior efforts resemble the Mayorkas Memo in all material respects:

First, all of the analogous DHS guidelines of which *amici* are aware were issued to inform, and in some instances bind, lower-level immigration officers as to how best allocate the agency's limited resources vis-à-vis enforcement actions. *See, e.g.*, Memorandum from John Kelly, Sec'y of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017) ("Kelly Memo") at 1–2 (directing guidance to "all Department personnel" to "prioritize" certain categories of removable noncitizens)[12]; Memorandum from John Morton, Dir., ICE, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011) ("March 2011 Morton Memo") at 1–2 (binding "[a]ll ICE employees" to prioritize "[a]liens who pose a danger to national security or a risk to public safety[,]" "[r]ecent illegal entrants[,]" and noncitizen fugitives)[13]; Memorandum from Doris Meissner, Comm'r, INS, *Exercising Prosecutorial Discretion* (Nov. 17, 2000) ("Meissner Memo") at 1, 6 (directing guidance to "[s]ervice officers" including regional directors, district directors, chief patrol agents, and regional and district counsel to

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[11] Appendix B annexed to this brief provides a non-exhaustive list of immigration enforcement guidelines from 2000 to present that *amici* reviewed and confirmed were not subject to notice-and-comment rulemaking.

[12] https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

[13] https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

emphasize "investigations that are specifically focused to identify aliens who represent a high priority for removal . . . over investigations which . . . will identify a broader variety of removable aliens").[14]

In fact, the very same priorities identified in the Mayorkas Memo—national security, public safety, and border security—have long been identified as immigration enforcement priorities in DHS guidance documents not subject to notice and comment under Republican and Democratic administrations alike. *E.g.*, Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) at 3–4 (delineating "Priority 1" noncitizens who are "threat[s] to national security, border security, and public safety"); March 2011 Morton Memo at 1–2 (identifying as "Priority 1" "Aliens who pose a danger to national security or a risk to public safety"); *see also* Kelly Memo at 2 (prioritizing removable noncitizens who "pose a risk to public safety or national security"); *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review* (Nov. 17, 2011) ("2011 ICE Guidance") at 1 (prioritizing for "accelerated" removal proceedings noncitizens who are suspected terrorists or national security risks).[15]

Second, like the Mayorkas Memo, many of the guidance memoranda explicitly clarified, restated, or changed DHS

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[14] https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf.

[15] https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf.

enforcement priorities because of resource constraints.[16] This common-sense way of ensuring that the agency's finite budget is best utilized has, until now, been uncontroversial.

Third, the same "mitigating factors [] militat[ing] in favor of declining enforcement action" set forth in the Mayorkas Memo are echoed in prior DHS guidelines. *E.g.*, Memorandum from John Morton, Dir., ICE, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011) at 1–2 (deprioritizing for removal proceedings "individual[s] known to be the immediate victim or witness to a crime" and directing "ICE officers, agents, and attorneys" to consider a host of factors in exercising discretion).[17]

Fourth and finally, as with the Mayorkas Memo and consistent with historical agency practice, none of the enforcement guidelines purport to confer any substantive benefits on noncitizens or otherwise create law. To the contrary, like the Mayorkas Memo, many of the prior guidance documents expressly disclaimed the creation of any legal rights or obligations for any individual or other parties. *See, e.g.*, March 2011 Morton Memo at 4; Memorandum from John Morton, Dir., ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

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[16] Like the Mayorkas Memo, (App. 112), almost every DHS enforcement memoranda emphasizes DHS's limited resources and the importance of prioritization to the agency's ability to function. *E.g.*, Meissner Memo at 4 ("[T]he INS has finite resources . . . . The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals.").

[17] https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf.

(June 17, 2011) at 6; Memorandum from Bo Cooper, INS General Counsel, *Motions to Reopen for Consideration of Adjustment of Status* (May 17, 2001) at 3.[18] DHS thus has made clear that such guidance memoranda are statements of policy and cannot be relied upon to confer or take away any rights.

The Fifth Circuit's holding deviates from 76 years of practice under the APA. If affirmed, that ruling would reverse decades of standard practice that has delivered precisely what the APA intended through its requirements and exceptions—a combination of efficiency and transparency.

III. If Notice And Comment Were Required To Issue Policy Guidelines Such As The Mayorkas Memo, The Executive Branch Would Be Less Efficient And Less Transparent.

Every agency issues guidelines and policy memoranda to inform, and at times bind, lower-level personnel. These guidelines are often issued in the wake of an administration change, statutory amendment, or a newfound phenomenon. If this Court affirms the Fifth Circuit and holds for the first time that notice-and-comment requirements apply to internal guidelines and memoranda announcing enforcement priorities, the federal government would be less responsive, less effective, and less transparent.

A. Requiring Notice And Comment Would Entangle Agencies In Process And Prevent Them From Performing Statutory Duties.

Nearly every federal agency head provides his or her lower-level personnel with guidance issued in the form of

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[18] https://www.aila.org/File/EmbeddedFile/48269.

a policy guideline or other non-legislative rule. This not only provides transparency to the public regarding the agency's priorities and resource constraints—an express goal of the APA—but also encourages a more uniform application of the agency's mandate throughout the agency's offices. Promoting fair, consistent, and publicly known priorities allows for a far more organized and dependable approach than allowing a proliferation of varied priorities decided by the whim of unaccountable lower-level agency personnel. *See, e.g.*, Peter M. Shane, Daniel A. Farber & Lisa Heinzerling, *Reforming "Regulatory Reform": A Progressive Framework for Agency Rulemaking in the Public Interest*, Pub. L. & Legal Theory Working Paper Series No. 490, 14 (July 8, 2019) (identifying the "manifest benefits" to guidance documents, including "transparency about an agency's views and intentions, to the benefit of regulated parties, the general public, Congress, and the White House[,]" "help[ing] to ensure that lower-level agency officials will follow a uniform approach," thereby "promoting consistency and fairness").

Importantly, agencies promulgate far more non-legislative rules than legislative rules. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1468–69 (1992); Connor N. Raso, *Strategic of Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 785–86 (2010). This highlights the critical extent to which agencies' capacity to carry out regulatory programs depends on issuance of non-legislative rulemaking, free from the delays and costs of notice and comment. *See* Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 Yale J. on Reg. 103, 108 (2008) (observing that guidance

documents are "a key component of regulatory programs").[19]

DHS itself demonstrates the value of an agency being able to publish policy guidelines in an efficient manner. According to the DHS website, Immigration and Customs Enforcement has more than 20,000 law enforcement and support personnel in more than 400 offices in the United States and around the world.[20] In so large a network of enforcement personnel, guidelines containing the Secretary's enforcement priorities serve the value of promoting consistency in agency action—making it more likely that similar cases are treated the same way regardless which office or officer engages with the applicant. Sound internal agency management under clear prophylactic guidance is, if anything, a more effective factor than post-hoc litigation in avoiding agency action that is (or could be seen to be) arbitrary, capricious, or an abuse of discretion. The purposes of the APA are thus furthered by clear policy statements being issued for both the public to review and lower-level personnel to implement.

The same is, of course, true for other agencies. For example, the Department of Justice's Environment and Natural Resources Division issued an "Enforcement Principles and Priorities" memorandum on January 14, 2021 ("DOJ Memo").[21] The DOJ Memo, which was not subject to a notice-and-comment process, "summarizes principles that guide the Division's civil and criminal enforcement work" and "describes a number of the Division's recent enforcement priorities." *Id.* at 1. Like

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[19] http://www.gao.gov/assets/680/672687.pdf.

[20] https://www.ice.gov/about-ice.

[21] https://www.justice.gov/enrd/file/1355081/download.

the Mayorkas Memo, the DOJ Memo "is not intended to be, and may not be, relied upon to create any rights, substantive or procedural, enforceable at law by any party in any civil or criminal matter." *Id.* at 1, n.1. Under the Fifth Circuit's approach, the DOJ Memo would also be deemed "procedurally invalid." (*See* App. 484.)

If upheld, the Fifth Circuit's erroneous ruling would impact multiple agencies across the Executive Branch, which regularly follow the same well-established practices as DHS and DOJ. For example, the Securities and Exchange Commission's Division of Examinations issued its 2022 "Examination Priorities,"[22] a set of guidelines that "like all staff guidance, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person." *Id.* at 1, n.1. The SEC Memo explains the Division of Examination's "prioritiz[ation] [] of certain practices, products, and services that it believes present potentially heightened risks to investors or the integrity of the U.S. capital markets." *Id*. at 11. It states that the Division of Examinations "will prioritize examinations of several significant focus areas that pose unique or emerging risks to investors or the markets, as well as examinations of core and perennial risk areas." *Id*. The Division of Examinations explained that this approach will "allocate significant resources to the examination issues described herein" to combat these "priorities" given their "importance to investors and the markets, coupled with the seriousness and frequency of observations in prior years' examinations[.]" *Id*. at 11, 26. If the Fifth Circuit were

[22] https://www.sec.gov/files/2022-exam-priorities.pdf.

correct, the SEC Memo would be in jeopardy due to the lack of notice and comment.

Indeed, nearly every agency has a list of their policy guidelines available for the public's review. *See, e.g.*, https://www.transportation.gov/civil-rights/civil-rights-library/policies. Many, if not most, of these guidelines would likely be impacted were the Fifth Circuit's framework affirmed. The Fifth Circuit's opinion regarding notice-and-comment threatens fundamental aspects of the APA and will have the detrimental and costly impact of impeding agency actions and promoting dilatory litigation.

B. Contrary To The APA's Transparency Goals, The Fifth Circuit's Holding Encourages Agencies To Act In Secrecy.

Upending the historical and party-agnostic understanding that enforcement guidelines are not subject to notice and comment also would introduce chaos into the agencies and force agency heads to make unwelcome decisions regarding transparency to the public.

Under the Fifth Circuit's approach, agency heads would have two, mutually exclusive options. They could continue to apprise the public of agency policies through notice-and-comment processes. Judiciary Committee Print, S. Doc. No. 79-248, at 18; Strauss 2001, *supra*, at 804–12. This approach takes time, resources, and would ensure that an administration's policy decisions would be significantly delayed, if not entirely defeated, by process.

Researchers have found that the notice-and-comment process takes, on average, approximately just under two years to complete. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94(4) Va. L. Rev. 889, 958–59 (2008) (determining that "[a]ll agencies but the HHS" completed rulemakings "in less than two years, on average"). As a

result, agency heads would surely think twice before subjecting policy guidance to a multi-year process that could potentially produce results only *after* the issue has changed or the administration turned over. In seeking to effectuate important policies then, the incentive would be to adopt priorities outside the view of stakeholders.

Imposing notice-and-comment requirements to administrative actions beyond legislative rules would thus likely encourage agency heads to forgo apprising the public of agency policy and enforcement priorities. Good governance, efficient decision-making, and democratic accountability would be the likely casualties. Hickman & Pierce, *supra*, § 19.3 (stating that less agency transparency undermines accountability, transforming policymaking into "an underground operation in which only a few favored individuals and interest groups participate"). Agency heads could try to inform subordinates through word of mouth or other informal means, but there would be no official pronouncement that the public or agency employees could trust. This would inevitably lead to reduced visibility into the agency's workings and hamper the public's ability to hold the administration accountable. *See* Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 58–62 (1992) (discussing the unintended, deleterious consequences of California's mandated notice-and-comment process for non-legislative rules); Hickman & Pierce, *supra*, § 19.3 (stating that agencies unconstrained by binding policy guidance leads to "[t]ens of thousands of low level bureaucrats [having] broad discretionary powers, and the affected members of the public w[ould] have no means of predicting the many ways in which agency employees w[ould] exercise those discretionary powers").

If the Fifth Circuit's holding regarding notice-and-comment requirements were to be affirmed, everyone

would lose: the public would have decreased, if any, means of assessing agency resource utilization or priorities; agency heads would be unable to effectively and uniformly apprise subordinates of policy goals; and the agencies would be hamstrung by process if they wanted to publicly announce their priorities consistent with the goals of the APA. Rather than encourage "an underground operation in which only a few favored individuals and interest groups participate," Hickman & Pierce, *supra*, § 19.3, the Court should reverse the Fifth Circuit and allow agencies to publicly set their enforcement priorities as they have for decades, in accordance with the statutory text and the policies animating the APA.

CONCLUSION

The Fifth Circuit's decision should be reversed, and with it the framework set forth in *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), to the extent that decision compelled the erroneous decision on review.

Respectfully submitted,

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APPENDIX

Appendix A

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The Ohio State University Moritz College of Law

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[1] Affiliations of *amici* are provided for purposes of identification only.

Appendix B

Each of the immigration enforcement guidance documents listed below—none of which were subject to notice and comment—is similar to the Mayorkas Memo.

1. Memorandum from Bo Cooper, INS General Counsel, *INS Exercise of Prosecutorial Discretion* (July 11, 2000) (https://www.shusterman.com/pdf/prosecutorialdiscretiomemocooper.pdf);
2. Memorandum from Doris Meissner, Comm'r, INS, *Exercising Prosecutorial Discretion* (Nov. 17, 2000) (https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf);
3. Memorandum from Bo Cooper, INS General Counsel, *Motions to Reopen for Consideration of Adjustment of Status* (May 17, 2001) (https://www.aila.org/File/EmbeddedFile/48269);
4. Memorandum from William R. Yates, Ass't Dir. for Operations, USCIS, *Service Center Issuance of Notice to Appear (Form I-862)* (Sept. 12, 2003) (https://www.aila.org/File/EmbeddedFile/48109);
5. Memorandum from John P. Torres, Dir., ICE, *Discretion in Cases of Extreme or Severe Medical Concern* (Dec. 11, 2006) (https://www.ice.gov/doclib/foia/dro_policy_memos/discretionincasesofextremeorseveremedicalconcerndec112006.pdf);

6. Memorandum from John Torres, Dir., ICE, *Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005* (Jan. 22, 2007) (https://niwaplibrary.wcl.american.edu/wp-content/uploads/CONF-VAWA-ICE-OPLA-VAWA-2005-Confidentiality-Memo-2.1.2007.pdf);
7. Memorandum from William J. Howard, Principal Legal Advisor, ICE, *VAWA 2005 Amendments to the Immigration and Nationality Act and 8 U.S.C. § 1367* (Feb. 1, 2007) (https://niwaplibrary.wcl.american.edu/wp-content/uploads/CONF-VAWA-ICE-OPLA-VAWA-2005-Confidentiality-Memo-2.1.2007.pdf);
8. Memorandum from Julie L. Myers, Ass't Sec'y ICE, *Prosecutorial and Custody Discretion* (Nov. 7, 2007) (https://www.shusterman.com/pdf/Myers_pros_discretion_11-7-07.pdf);
9. Memorandum From Peter S. Vincent, Principal Legal Advisor, ICE, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009) (https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf);
10. Memorandum from John Morton, Ass't Sec'y, *National Fugitive Operations Program: Priorities, Goals, and Expectations* (Dec. 8, 2009) (https://www.ice.gov/doclib/detention-reform/pdf/nfop_priorities_goals_expectations.pdf);
11. Memorandum from John Morton, Ass't Sec'y, ICE, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (June 30, 2010) (https://www.ice.gov/

doclib/news/releases/2010/civil-enforcement-priorities.pdf);

12. Memorandum from John Morton, Ass't Sec'y, ICE, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010) (https://www.ice.gov/doclib/foia/prosecutorial-discretion/handling-removal-proceedings.pdf);

13. Memorandum from John Morton, Dir., ICE, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011) (https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf);

14. Memorandum from John Morton, Dir., ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011) (https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf);

15. Memorandum from John Morton, Dir., ICE, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011) (https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf);

16. *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review* (Nov. 17, 2011) (https://www.ice.gov/doclib/foia/prosecutori

al-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf);

17. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) (https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); and

18. Memorandum from John Kelly, Sec'y of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017) (https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).