

No. 22-58

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS, STATE OF LOUISIANA,
Respondents.

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

**BRIEF OF AMICI CURIAE 21 CITIES, COUN-
TIES, AND LOCAL GOVERNMENT ORGANI-
ZATIONS IN SUPPORT OF PETITIONERS**

DANIEL R. SUVOR
Counsel of Record
JAMES A. BOWMAN
KELSEY A. CHANDRASOMA
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
dsuvor@omm.com
jbowman@omm.com
kchandrasoma@omm.com
(213) 430-6000

*Counsel for Amicus Curiae
County of Los Angeles, Calif.*

Additional Counsel for Amici Listed in Appendix

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. § 1252(f)(1), or otherwise violate the Administrative Procedure Act.
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).

TABLE OF CONTENTS

	Page
INTERESTS OF AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT	7
I. POORLY PRIORITIZED AND AGGRESSIVE REMOVAL POLICY HARMS THE SAFETY OF AMICI’S COMMUNITIES BY ERODING TRUST IN LOCAL GOVERNMENT.....	7
A. Immigrants Make Amici’s Communities Safer.	8
B. Fear Of Removal Decreases Immigrants’ Cooperation With Police.	9
II. INCREASED, UNPRIORITIZED REMOVALS WILL CAUSE IMMIGRANTS TO FORGO CRUCIAL HEALTHCARE SERVICES AND HARM AMICI’S PUBLIC HEALTH.	14
A. Fear Of Deportation Causes Immigrants To Forgo Medical Services.	15
B. When Immigrants Avoid Medical Services, Amici’s Long-Term Success And Public Health Both Suffer.	18

**TABLE OF CONTENTS
(continued)**

	Page
III. AMICI BEAR THE COST OF POORLY PRIORITIZED REMOVALS WHEN IMMIGRANT FAMILIES ARE TORN APART.....	21
IV. THE DISTRICT COURT ERRED IN VACATING THE GUIDELINES BECAUSE THE GUIDELINES ARE NOT REQUIRED TO UNDERGO NOTICE AND COMMENT.	27
CONCLUSION.....	33
List of Amici Curiae	1a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Arizona v. Biden</i> , 40 F. 4th 375 (6th Cir. 2022)	32
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979).....	4, 7, 27
<i>Guernsey Mem’l Hosp. v. Sullivan</i> , 796 F. Supp. 283 (S.D. Oh. 1992)	30
<i>Hillsborough Cnty. v. Automated Med. Labs., Inc.</i> , 471 U.S. 707 (1985).....	2
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).....	passim
<i>PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.</i> , 139 S. Ct. 2051 (2019).....	27
<i>Perez v. Mortg. Bankers Ass’n</i> , 575 U.S. 92 (2015).....	27
<i>Reno v. Am.-Arab Anti-Discrimination Comm.</i> , 525 U.S. 471 (1999).....	1, 28
<i>Shalala v. Guernsey Mem’l Hospital</i> , 514 U.S. 87 (1995).....	29, 30
<i>Texas v. United States</i> , 809 F.3d 134 (5th Cir. 2015).....	6, 28
STATUTES	
5 U.S.C. § 553(b).....	27

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

Notice of Public Rulemaking on Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10,570 (Feb. 24, 2022)	17
Sup. Ct. R. 37.3(a)	1
Sup. Ct. R. 37.6	1

OTHER AUTHORITIES

Alex Nowrasteh, <i>Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes</i> , CATO Inst. (Feb. 26, 2018), https://www.cato.org/publications/migration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant#arrests	8
Alexandra Ashbrook, Food Research and Action Ctr., <i>New Data Reveal Stark Decreases in SNAP Participation Among U.S. Citizen Children Living With a Non-Citizen</i> (May 2021); https://frac.org/wp-content/uploads/SNAP-Participation-Among-U.S.-Citizen-Children.pdf	18
Am. Immigration Council, <i>U.S. Citizen Children Impacted by Immigration Enforcement</i> (Nov. 22, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf	24

TABLE OF AUTHORITIES
(continued)

	Page(s)
Anita Khashu, Police Found., <i>The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties</i> (Apr. 2009), https://www.policinginstitute.org/wp-content/uploads/2015/06/The-Role-of-Local-Police-Narrative.pdf	13
Annie Laurie Hines & Giovanni Peri, Inst. of Labor Econ., <i>Immigrants' Deportations, Local Crime and Police Effectiveness</i> (June 2019), https://ftp.iza.org/dp12413.pdf	9
Anthony Wallace et al., <i>Afraid of Assistance: Trump's Public Charge Rule Sends Chill Through Immigrant Community</i> , ASU Walter Cronkite Sch. Of Journalism & Mass Comm'n, https://cronkitezine.asu.edu/bootcamp19/public-charge/index.php/public-charge-story/	17
Brianna Ehley et al., <i>Fearing Deportation, Immigrants Forgo Medical Care</i> , Politico (July 17, 2017), https://www.politico.com/story/2017/07/17/deportation-fears-under-trump-have-immigrants-forgoing-medical-care-240635	15

TABLE OF AUTHORITIES
(continued)

	Page(s)
Daniela Alulema & Jacquelyn Paviion, Ctr. for Migration Studies, Immigrants' Use of New York City Programs, Services, and Benefits: Examining the Impact of Fear and Other Barriers to Access (Jan. 2022), https://cmsny.org/wp-content/uploads/2022/02/Immigrants-Use-of-New-York-City-Programs-Services-and-Benefits-CMS-Report-013122-FINAL.pdf	10, 11, 16, 20
David Becerra, <i>Anti-immigration Policies and Fear of Deportation: A Human Rights Issue</i> , 1 J. Hum. Rts. & Soc. Work 109 (Aug. 17, 2016).....	11, 16, 19
Elaine Kamarck and Christine Stenglein, <i>How many undocumented immigrants are in the United States and who are they?</i> , The Brookings Inst. (Nov. 12, 2019), https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/	4
Elisa Jácome, <i>The Effect of Immigration Enforcement on Crime Reporting: Evidence from the Priority Enforcement Program</i> (Princeton Univ. Indus. Relations Section, Working Paper No. 624, 2018), https://dataspace.princeton.edu/bitstream/88435/dsp018p58pg70r/3/624.pdf	14

TABLE OF AUTHORITIES
(continued)

	Page(s)
Elizabeth Trovall, <i>Under Texas ruling, a Trump-era approach to deportations returns</i> , Immigration Attorney (2022), https://aaz.my.id/under-texas-ruling-a-trump-era-approach-to-deportations-returns.html	12
Enrico Moretti, U.C. Berkeley Dep't of Econ., <i>Social Returns to Education and Human Capital Externalities: Evidence from Cities</i> (Dec. 1998), http://darp.lse.ac.uk/PapersDB/Moretti_(98).pdf	26
George Foulsham, <i>Deportation, loss of health care raise concerns in L.A. County, according to UCLA Survey</i> , UCLA Newsroom (Apr. 4, 2017), http://newsroom.ucla.edu/releases/deportation-loss-of-health-care-raise-concerns-in-l-a-county-according-to-ucla-survey	15
Gretchen Gavett, <i>Study: 5,100 Kids in Foster Care After Parents Deported</i> , Frontline (Nov. 3, 2011), https://www.pbs.org/wgbh/frontline/article/study-5100-kids-in-foster-care-after-parents-deported/	25

TABLE OF AUTHORITIES
(continued)

	Page(s)
Hamutal Bernstein et al., <i>Adults in Low-Income Immigrant Families Were Deeply Affected by the COVID-19 Crisis Yet Avoided Safety Net Programs in 2020</i> , Urban Inst. (May 2021), https://www.urban.org/sites/default/files/publication/104280/adults-in-low-income-immigrant-families-deeply-affected-by-pandemic-yet-avoided-safety-net.pdf	19
Health and Academic Achievement, Ctrs. For Disease Control & Prevention (May 2014), https://perma.cc/3VXF-Y9LC	20
Helen B. Marrow, The power of local autonomy: expanding health care to unauthorized immigrants in San Francisco, 35 <i>Ethnic & Racial Stud.</i> 72 (2012).....	21
James S. Gordon, <i>Living in fear of deportation is terrible for your health</i> , Wash. Post (Feb. 10, 2017), https://www.washingtonpost.com/posteverything/wp/2017/02/10/living-in-fear-as-a-refugee-in-the-u-s-is-terrible-for-your-health/	19
Jan Hoffman, <i>Sick and Afraid, Some Immigrants Forgo Medical Care</i> , N.Y. Times (June 26, 2017), https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html	15, 21

TABLE OF AUTHORITIES
(continued)

	Page(s)
Jeffrey Thomas DeSocio, <i>US Border Patrol Dispatches boats, 450 rescues reported</i> , Fox 26 Houston (Aug. 31, 2017), http://www.fox26houston.com/news/us-border-patrol-dispatches-boats-450-rescues-reported	16
Jill Theresa Messing et al., <i>Latinas’ Perceptions of Law Enforcement: Fear of Deportation, Crime Reporting, and Trust in the System</i> , 30 <i>Affilia J. Women & Soc. Work</i> 328 (Mar. 20, 2015).....	11
Jonathan Rothwell, <i>What Colleges Do for Local Economies: A Direct Measure Based on Consumption</i> , The Brookings Inst., (Nov. 17, 2015), https://www.brookings.edu/research/what-colleges-do-for-local-economies-a-direct-measure-based-on-consumption/	26
Kaiser Family Found., <i>Health Coverage of Immigrants</i> (Apr. 6, 2022), https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/	21
Karen Hacker et al., <i>The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA</i> , 73 <i>Soc. Sci. & Med.</i> 586 (Aug. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3159749/pdf/nihms308839.pdf	18

TABLE OF AUTHORITIES
(continued)

	Page(s)
Kathleen M. Roche et al., Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents, 62 J. Adolescent Health 525 (Mar. 1, 2018)	13, 15
L.A. Cnty. Dep't of Children & Fam Servs., <i>Parent Resources</i> , https://dcfs.lacounty.gov/parents/parent-resources/	25
L.A. County Sheriff Jim McDonnell's statement about Senate Bill 54 regarding immigration, The Signal (Sept. 16, 2017), https://perma.cc/XF4Y-DJXT	10
Los Angeles, Ctr. for the Study of Immigrant Integration, USC Dornsife Coll. of Letters, Arts & Scis., https://dornsife.usc.edu/assets/sites/731/docs/LOSANGELES_web.pdf	23
Luis H. Zayas & Laurie Cook Heffron, PhD, <i>Disrupting Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants</i> , Am. Psychological Ass'n (Nov. 2016), https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation	23
Margaret Edmunds & Molly Joel Coye, <i>America's Children: Health Insurance and Access to Care</i> (1998), https://www.ncbi.nlm.nih.gov/books/NBK230381/pdf/Bookshelf_NBK230381.pdf	20

TABLE OF AUTHORITIES
(continued)

	Page(s)
Mayor’s Office of Immigrant Affairs, Annual Report (2019), https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-Annual-Report-for-2019.pdf	23
Michael Hiltzik, <i>Column: A punitive Trump proposal stokes panic among immigrants—even before it’s official</i> , L.A. Times (Aug. 24, 2018), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-public-charge-20180824-story.html	18
Michael T. Light & Ty Miller, <i>Does Undocumented Immigration Increase Violent Crime?</i> , 56 <i>Criminology</i> 370 (2018)	9
Migration Policy Inst., <i>Profile of the Unauthorized Population: Los Angeles County, CA</i> , https://www.migrationpolicy.org/data/unauthorized-immigrant-population/county/6037	23
Migration Policy Inst., <i>Profile of the Unauthorized Population: San Francisco County, CA</i> , https://www.migrationpolicy.org/data/unauthorized-immigrant-population/county/6075	23
Nik Theodore, Dep’t of Urban Planning & Pol’y, Univ. of Ill. at Chi., <i>Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement</i> (May 2013), https://perma.cc/4B5R-7JL4	10

TABLE OF AUTHORITIES
(continued)

	Page(s)
Rafael Bernal, <i>Analysis: More than 10 million US citizens live with an undocumented immigrant</i> , The Hill (Sept. 10, 2021), https://thehill.com/latino/571649-analysis-more-than-10-million-in-us-live-with-an-undocumented-immigrant	22, 23
Rafaela Rodrigues et al., Nat'l Immigrant Women's Advocacy Project, Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey (2018), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf	12, 13
Randy Capps et al., Migration Pol'y Inst., Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement (2011), https://perma.cc/T3PR-X4LG	12
Sophia Koropecyk et al., Am. Acad. of Arts & Scis., The Economic Impact of Increasing College Completion (2017), https://www.amacad.org/sites/default/files/publication/downloads/CFUE_Economic-Impact.pdf	26

TABLE OF AUTHORITIES
(continued)

	Page(s)
Sophie Collyer et al., Poverty Tracker, Vulnerabilities and Service Needs of Single-Parent Households in New York City, https://www.robinhood.org/wp-content/themes/robinhood/images/poverty-tracker/pdfs/POVERTY_TRACKER_REPORT9.pdf	24
Steven Asch et al., <i>Does Fear of Immigration Authorities Deter Tuberculosis Patients from Seeking Care?</i> , 161 W. J. Med. 373 (Oct. 1994), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1022616/pdf/westjmed00062-0027.pdf	21
Suzanne Monyak, <i>Lack of immigration guidance set to ripple through enforcement</i> , Roll Call (Aug. 4, 2022), https://rollcall.com/2022/08/04/lack-of-immigration-guidance-set-to-ripple-through-enforcement/	22
T.H. Gindling and Sara Z. Poggio, <i>The Effect of Family Separation and Reunification on the Educational Success of Immigrant Children in the United States</i> , Inst. For Study of Labor (Apr. 2010), https://docs.iza.org/dp4887.pdf	26
Tara Watson, <i>Inside the Refrigerator: Immigration Enforcement and Chilling Effects in Medicaid Participation</i> , 6 Am. Econ. J.: Econ. Pol’y 313 (2014).....	17

TABLE OF AUTHORITIES
(continued)

	Page(s)
Teresa A. Coughlin et al., <i>Uncompensated Care for the Uninsured in 2013: A Detailed Examination</i> , KFF (May 30, 2014), https://www.kff.org/uninsured/report/uncompensated-care-for-the-uninsured-in-2013-a-detailed-examination/	19, 20
Teresa Wiltz, <i>If Parents Get Deported, Who Gets Their Children?</i> The PEW Charitable Trs. (Oct. 25, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children	25
Timothy Callaghan et al., BMC Health Servs. Research, <i>Immigrant Health Access in Texas: policy, rhetoric, and fear in the Trump era</i> (June 5, 2019), https://bmchealthservres.biomedcentral.com/track/pdf/10.1186/s12913-019-4167-1.pdf	16
U.S. Dep't of Just., Office of Cmty. Oriented Policing Servs., <i>Final Report of the President's Task Force on 21st Century Policing</i> (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf	9

INTERESTS OF AMICI CURIAE¹

Amici curiae²—21 local governments and local government organizations from every region of the country and every type of community, from some of the nation’s most populous and diverse cities and counties to suburbs, small towns, and rural precincts—submit this amicus brief in support of Defendants-Petitioners (the Federal Government) and for reversal. Under longstanding precedent, the Federal Government has broad discretion to prioritize removal decisions. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (explaining that at “each stage” of the removal process, including “executing removal orders,” the Federal Government “has discretion to abandon the endeavor”). This discretion is a deep-rooted tradition, and it ensures that the Federal Government accounts for immigrants’ individual circumstances and its own limited resources for immigration enforcement.

Plaintiffs-Respondents (the States) seek to uproot that tradition. If the States have their say, longstanding historical removal discretion will be wrested from the Federal Government, requiring it instead to take a more aggressive, inconsistent,

¹ The parties have filed blanket consent to the filing of amicus briefs. *See* Sup. Ct. R. 37.3(a). No party’s counsel authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

² A complete list of amici is provided in Appendix A.

poorly prioritized approach resulting in arbitrary removals. This change in policy and practice will create chaos, cause more immigrants to fear removal, and impose devastating safety and public health consequences on the communities throughout the U.S. in which millions of both unauthorized immigrants and their citizen and lawful resident family members live.

Collectively, amici represent millions of people whose health and welfare amici bear primary responsibility for promoting and protecting. *See, e.g., Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) (residents' health and safety are "primarily, and historically, a matter of local concern"). From schools to public utilities, from libraries and parks to social services, amici administer many of the basic governmental programs that sustain American communities. Amici provide local law enforcement. Amici operate healthcare services, such as safety-net hospitals and emergency services, and bear responsibility for protecting the public health. And amici provide resources to care for struggling families and children in the foster care system. In short, amici are the primary backstop for many of the interconnected, everyday needs of residents in communities across the United States.

Millions of amici's residents are immigrants and the children of immigrants. Their lives form integral threads in the fabric of amici's communities. Because the well-being of amici's immigrant residents is critical to the health and safety of cities and counties as a whole, amici understand the importance of protecting immigrant communities.

Amici therefore have a strong interest in the Federal Government’s retention of its historical discretion to prioritize removals, and in ensuring that law-abiding, productive immigrants in amici’s communities are protected from an arbitrary, discretion-less removal policy that fails to account for individual circumstances.³ Without such discretion, the health and safety of amici’s communities will suffer. Immigrants will increasingly fear deportation, leading many to avoid contact with local law enforcement or healthcare services—a result that would harm all of amici’s residents. More immigrant families also will suffer the trauma of family separation, and the resulting negative effects will be felt acutely both by the children left behind (including many U.S. citizen children living in mixed-status families) and by amici, which will bear the costs of responding to those consequences.

The District Court’s vacatur order disregards these harms to amici. The order also rests on a fundamental legal error: The District Court’s erroneous conclusion that when the Department of Homeland Security (DHS) issued the September 30, 2021 Guidelines for the Enforcement of Civil Immigration Law (the Guidelines), it violated the Administrative Procedure Act (APA) by failing to undergo notice and comment. Under blackletter APA law, notice and

³ Similar to the federal government, amici carry out law enforcement functions within their jurisdictions and must prioritize among competing needs to meet community needs. Amici therefore have an interest in ensuring that executive offices at every level of government retain flexibility to determine their priorities and guide the allocation of limited resources.

comment is not required for general statements of policy. *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 n.31 (1979). And under this Court’s precedent, that is exactly what the Guidelines are—they advise the public prospectively of the manner in which DHS proposes to exercise a discretionary power.

To grow and thrive, amici will need contributions from all their residents—native born and immigrant alike. But residents cannot make those contributions if they live under the constant specter of removal, fear cooperation with local law enforcement, avoid access to needed medical care, or bear the psychological scars of family separation. Amici therefore have a strong interest in ensuring that the Federal Government’s discretion to prioritize removals is not impinged.

For these reasons, amici respectfully request that the Court reverse.

SUMMARY OF THE ARGUMENT

The Guidelines arise from an undeniable reality: There are nearly 10.5 million unauthorized immigrants in the United States, and the Federal Government has only finite resources to devote to immigration enforcement.⁴ In prioritizing for removal certain noncitizens who pose a threat to national se-

⁴ Elaine Kamarck and Christine Stenglein, *How many undocumented immigrants are in the United States and who are they?*, The Brookings Inst. (Nov. 12, 2019), <https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/>.

curity, public safety, or border security, the Guidelines reflect the Federal Government’s sensible determination that its limited resources are best devoted to apprehending and removing noncitizens who threaten the safety of their communities and other individuals. The Guidelines eschew a one-size-fits all, zero-tolerance approach in favor of a practical framework that prioritizes persons who pose a threat while preserving the Federal Government’s ability to make removal decisions on a case-by-case basis. The Guidelines are intended to assist immigration officers in making individualized removal determinations; they avoid “bright lines or categories” and instead instruct officers to consider the “individual and the totality of the facts and circumstances” when determining whether a particular noncitizen poses a threat. J.A. 113. The District Court’s vacatur order improperly forces the Federal Government to abandon commonsense priorities and robs immigration officers of their historical discretion to decide whom to remove—making a working mother with no criminal history just as great a removal priority as a would-be terrorist or violent felon.

That unprincipled approach to removals will harm the safety, public health, and future prosperity of amici’s communities. When deportation policies are aggressive and indiscriminate, fear of deportation within immigrant communities increases, causing immigrants to interact less with local law enforcement and undermining public safety. Fear of removal also discourages immigrants from seeking medical care; this, in turn, negatively affects the

public health and directly harms amici, which bear the increased healthcare costs incurred when residents do not have access to preventative medical care. A removal policy that treats law-abiding individuals who work to support their families and contribute to their communities the same as persons suspected of terrorism or espionage also risks needlessly tearing apart productive families in amici's communities, including many mixed-status families with U.S. citizen children. The negative effects of family separation are widespread and far-reaching: Children suffer emotional and physical consequences, and amici lose out on the prosperity that those children could have brought to their communities.

The District Court's order disregards these harms to amici. It also rests on a plain legal error. In finding vacatur was warranted, the District Court incorrectly determined that the Guidelines violated the APA because they failed to undergo notice and comment. In reaching that conclusion, the District Court relied on the Fifth Circuit's decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), which instructs that general statements of policy must not bind agency officers and must "*genuinely* leave[] the agency and its decision-makers free to exercise discretion." *Id.* at 171 (emphasis added). But that standard and the District Court's conclusion cannot be squared with this Court's precedent, under which a general statement of policy is one that "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power."

Lincoln, 508 U.S. at 197 (quotation omitted); *Chrysler Corp.*, 441 U.S. at 301 n.31.

The Guidelines are plainly a general statement of policy under this Court's precedent because they advise the public prospectively of the manner in which DHS proposes to exercise its discretionary power to prioritize removals. The District Court's contrary conclusion was incorrect because this Court's precedent does not require consideration of whether a rule binds agency officers. Moreover, the District Court's finding that the Guidelines leave no room for discretion is at odds with the plain text of the Guidelines, which sets forth factors to guide immigration officers' exercise of discretion and expressly states that whether enforcement is appropriate in a particular case is an individualized determination to be assessed under the totality of the circumstances.

The District Court's vacatur order was in error and should be reversed.

ARGUMENT

I. POORLY PRIORITIZED AND AGGRESSIVE REMOVAL POLICY HARMS THE SAFETY OF AMIC'S COMMUNITIES BY ERODING TRUST IN LOCAL GOVERNMENT.

The Federal Government has wisely determined that certain noncitizens should be prioritized for removal, primarily those who pose a threat to national security, public safety, or border security. The States seek to eradicate the Federal Government's longstanding removal discretion and propose a

senseless alternate reality in which DHS operates without any priorities or principles to guide removal decisions. Setting aside the fact that the Federal Government simply lacks the resources to remove every noncitizen technically subject to removal, eradicating the Federal Government's ability to account for individual circumstances would be poor policy and would have far-reaching detrimental consequences. An unprincipled, aggressive approach to removals would breed confusion and increase fear of deportation among law-abiding immigrants. This, in turn, would decrease immigrants' cooperation and engagement with police and harm amici's communities.

A. Immigrants Make Amici's Communities Safer.

Numerous studies show that undocumented immigrants help keep amici's communities safe. Undocumented immigrants, in general, have lower conviction and arrest rates than U.S. citizens.⁵ And contrary to the fearmongering that infects public discourse, there is no evidence that undocumented immigrants increase violent crime; indeed, undocumented immigration has been linked to *decreases* in

⁵ Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO Inst. (Feb. 26, 2018), <https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant#arrests>.

violent crime.⁶ One study found that even a substantial increase in deportations was not associated with a reduction of violent crime.⁷

By contrast, a broad policy that seeks the removal of all immigrants from communities, regardless of the threat posed by a particular individual, puts a strain on police resources. One study found that when deportations increase, local law enforcement agencies must devote a larger percentage of their total resources to deportation enforcement.⁸ This diverts local resources that otherwise would have been used for public safety.⁹

B. Fear Of Removal Decreases Immigrants' Cooperation With Police.

Successful law enforcement requires a cooperative, trusting relationship between the police and the communities they serve. A core tenet of law enforcement is community policing, which strives for cooperation between police and neighborhood residents to reduce crime and promote public safety.¹⁰

⁶ Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 *Criminology* 370, 370 (2018).

⁷ Annie Laurie Hines & Giovanni Peri, Inst. of Labor Econ., *Immigrants' Deportations, Local Crime and Police Effectiveness* 14 (June 2019), <https://ftp.iza.org/dp12413.pdf>.

⁸ *Id.* at 17.

⁹ *Id.*

¹⁰ See U.S. Dep't of Just., Office of Cmty. Oriented Policing Servs., *Final Report of the President's Task Force on 21st Century Policing* 3 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

Researchers and law enforcement officials agree: When immigrants fear deportation for themselves or those close to them, they are less likely to cooperate with police or report crime.¹¹

Eliminating the Federal Government’s discretion to deprioritize removals of immigrants who pose no threat will increase fear of deportation and erode immigrant communities’ trust in local law enforcement. When fear of deportation increases, crime reporting decreases. One study found that, due to fears that law enforcement officers will ask about immigration status, 67% of undocumented individuals are less likely to offer information to law enforcement as a witness and 70% are less likely to contact law enforcement even if they were victims of a crime—all due to fears that police will ask about immigration status.¹² A recent survey in New York

¹¹ Daniela Alulema & Jacquelyn Paviion, Ctr. for Migration Studies, *Immigrants’ Use of New York City Programs, Services, and Benefits: Examining the Impact of Fear and Other Barriers to Access* 38-39 (Jan. 2022), <https://cmsny.org/wp-content/uploads/2022/02/Immigrants-Use-of-New-York-City-Programs-Services-and-Benefits-CMS-Report-013122-FINAL.pdf>. As Los Angeles County’s then-Sheriff put it: “Public safety is our mission. This requires that people come forward if they are a crime victim or be willing to come forth as a witness to a crime without fear of being deported. When I say that public trust is our currency, I mean it.” *L.A. County Sheriff Jim McDonnell’s statement about Senate Bill 54 regarding immigration*, *The Signal* (Sept. 16, 2017), <https://perma.cc/XF4Y-DJXT>.

¹² Nik Theodore, *Dep’t of Urban Planning & Pol’y, Univ. of Ill. at Chi., Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5-6 (May 2013), <https://perma.cc/4B5R-7JL4>.

City similarly found that many immigrants, documented and undocumented alike, avoid calling the police for fear of deportation.¹³

A survey of Latino immigrants living in Arizona found that those with a greater fear of deportation for themselves, a family member, or a close friend had significantly less confidence that police officers and courts in their community would treat Latino immigrants fairly.¹⁴ The danger for Latinas facing domestic abuse is particularly acute: An analysis of a 2008 nationwide survey of Latinas found that, regardless of immigration status, respondents who reported a greater fear of deportation for themselves, a family member, or a close friend were less likely to report being a victim of violent crime to the police.¹⁵

The consequences of this fear reverberate beyond unreported and unaddressed crimes. One study found that, in multiple counties, an increase in local-federal law enforcement cooperation resulted in immigrants venturing into public places less frequently, interacting less with schools and other institutions, patronizing businesses less often, and

¹³ Alulema & Pavidon, *supra* note 11 at 36-37.

¹⁴ David Becerra, *Anti-immigration Policies and Fear of Deportation: A Human Rights Issue*, 1 J. Hum. Rts. & Soc. Work 109, 109, 112 (Aug. 17, 2016).

¹⁵ Jill Theresa Messing et al., *Latinas' Perceptions of Law Enforcement: Fear of Deportation, Crime Reporting, and Trust in the System*, 30 *Affilia J. Women & Soc. Work* 328, 334 (Mar. 20, 2015).

changing their driving patterns.¹⁶ The District Court's vacatur order perpetuates these same disruptions. It has already upended life in some communities—one Houston-based immigrant advocate said that, since the vacatur order issued, he knows of immigrant couples who will not go out together with their children for fear they will get pulled over and deported.¹⁷

The on-the-ground experience of law enforcement officials is consistent with these findings. In 2017, law enforcement officials surveyed across 24 states reported that increased fear of immigration enforcement and scrutiny of immigration status led to a decline in immigrant victims' willingness to cooperate in criminal prosecutions, as well as an increase in the difficulty of investigating criminal cases because of immigrants' reluctance to cooperate.¹⁸ In a survey conducted by the national Police Foundation, a majority of law enforcement person-

¹⁶ Randy Capps et al., Migration Pol'y Inst., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* 43 (2011), <https://perma.cc/T3PR-X4LG>.

¹⁷ Elizabeth Trovall, *Under Texas ruling, a Trump-era approach to deportations returns*, Immigration Attorney (2022), <https://aaz.my.id/under-texas-ruling-a-trump-era-approach-to-deportations-returns.html>.

¹⁸ See Rafaela Rodrigues et al., Nat'l Immigrant Women's Advocacy Project, *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey* 2, 50-51, 100 (2018), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf>.

nel and public officials reported that aggressive immigration enforcement would decrease community trust of police (74%), decrease trust between community residents (70%), decrease reporting of crime victimization (85%), and decrease reporting of criminal activity (83%).¹⁹

The less that immigrants cooperate and engage with police due to fear of deportation, the more likely they are to remain silent as victims or witnesses, and the more crimes go unresolved. A 2017 survey of Latino immigrants in the mid-Atlantic found that, due to the immigration climate at the time, almost 40% of participants “very often” or “always” avoided contact with police and nearly 48% warned their children to stay away from authorities.²⁰ Such a distrustful environment compromises public safety at large and affects all residents in the community. Indeed, one study found that when immigrant victims do not cooperate with law enforcement, it undercuts officer safety, community safety, victim safety, and the ability to hold perpetrators accountable.²¹

¹⁹ Anita Khashu, Police Found., *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* 24 (Apr. 2009), <https://www.policinginstitute.org/wp-content/uploads/2015/06/The-Role-of-Local-Police-Narrative.pdf>.

²⁰ Kathleen M. Roche et al., *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, 62 *J. Adolescent Health* 525 (Mar. 1, 2018).

²¹ See Rodrigues, *supra* note 18 at 102-03.

The inverse also is true: Reducing fear of removal results in more cooperation with police. A study by Princeton University analyzed crime reporting rates in Dallas, Texas between 2013 and 2016 and found that crime reporting by Latinos increased by 10% after DHS limited its immigration enforcement priorities.²²

II. INCREASED, UNPRIORITIZED REMOVALS WILL CAUSE IMMIGRANTS TO FORGO CRUCIAL HEALTHCARE SERVICES AND HARM AMICI'S PUBLIC HEALTH.

Aggressive and arbitrary removal policies also corrode the public health of amici's communities. Fear of deportation causes immigrants to forgo crucial medical services for both themselves and their family members and dependents, even when those loved ones are U.S. citizens. This outcome undermines amici's public health investments and policies, which rely on all residents, regardless of immigration status, receiving and benefiting from preventative healthcare. Especially in communities with many immigrant residents, like Los Angeles County, public health depends on immigrants trusting the healthcare system and their healthcare providers.

²² Elisa Jácome, *The Effect of Immigration Enforcement on Crime Reporting: Evidence from the Priority Enforcement Program* 1, 10, 13 (Princeton Univ. Indus. Relations Section, Working Paper No. 624, 2018), <https://dataspace.princeton.edu/bitstream/88435/dsp018p58pg70r/3/624.pdf>.

A. Fear Of Deportation Causes Immigrants To Forgo Medical Services.

Immigrants and their family members and children, including U.S. citizen children, forgo crucial medical services when they fear deportation. One study found that 80% of those who feared deportation for themselves, a friend, or a family member believed that the risk of deportation increased with enrollment in any kind of governmental health program.²³ Similarly, a 2017 survey of Latino immigrant populations found immigration-related concerns caused 39% of those surveyed to avoid medical care, police, and other services.²⁴ Fear of deportation thus makes it more likely that individuals will miss doctor's visits, avoid filling their prescriptions, and forgo other basic preventative care practices.²⁵ Compounding that problem, fear of deportation also has been associated with negative social, emotional,

²³ George Foulsham, *Deportation, loss of health care raise concerns in L.A. County, according to UCLA Survey*, UCLA Newsroom (Apr. 4, 2017), <http://newsroom.ucla.edu/releases/deportation-loss-of-health-care-raise-concerns-in-l-a-county-according-to-ucla-survey>.

²⁴ Roche, *supra* note 20.

²⁵ See Jan Hoffman, *Sick and Afraid, Some Immigrants Forgo Medical Care*, N.Y. Times (June 26, 2017), <https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html>; Brianna Ehley et al., *Fearing Deportation, Immigrants Forgo Medical Care*, Politico (July 17, 2017), <https://www.politico.com/story/2017/07/17/deportation-fears-under-trump-have-immigrants-forgoing-medical-care-240635>.

and mental health outcomes, such as social isolation, stress, anxiety, and depression.²⁶

Amici are well aware of the ways that immigration-related fears negatively impact immigrants' health and access to healthcare. During former President Trump's time in office, a survey of 66 community health workers in Texas reported "the pervasive way that fear is limiting access to needed health care and social services for mixed status families."²⁷ And in Houston, during the severe flooding that followed Hurricane Harvey in 2017, some immigrants avoided rescue services because Customs and Border Patrol boats were used in relief efforts.²⁸ More recently, a New York City survey spanning the change in presidential administrations found that many immigrants avoided seeking hospital care or stopped treatment early for fear of deportation.²⁹

Immigrants who fear deportation also avoid medical services for their vulnerable family mem-

²⁶ Becerra, *supra* note 14.

²⁷ Timothy Callaghan et al., BMC Health Servs. Research, Immigrant Health Access in Texas: policy, rhetoric, and fear in the Trump era 3 (June 5, 2019), <https://bmchealthservres.biomedcentral.com/track/pdf/10.1186/s12913-019-4167-1.pdf>.

²⁸ *Id.*; see also Jeffrey Thomas DeSocio, *US Border Patrol Dispatches boats, 450 rescues reported*, Fox 26 Houston (Aug. 31, 2017), <http://www.fox26houston.com/news/us-border-patrol-dispatches-boats-450-rescues-reported>.

²⁹ Alulema & Pavilon, *supra* note 11 at 29-30.

bers and dependents, even those who are U.S. citizens.³⁰ For example, when the Public Charge Rule was in effect, several families refused to seek healthcare for their U.S. citizen children attending a public school in Phoenix due to fear of immigration consequences. The parents of a kindergartner born with ankyloglossia (restricted tongue), a condition easily fixed with surgery, could not afford the corrective procedure on their own but were afraid to enroll their child in Medicaid. And a third-grader diagnosed with autism who struggled with speaking fell behind his classmates and did not receive occupational therapy because his parents were afraid to enroll him in public benefits.³¹

Indeed, DHS has recognized that the Public Charge Rule had “widespread indirect effects, primarily with respect to those who were not even subject to the public charge ground of inadmissibility, such as U.S. citizen children in mixed-status households.”³² For example, because of the Public Charge

³⁰ See Tara Watson, *Inside the Refrigerator: Immigration Enforcement and Chilling Effects in Medicaid Participation*, 6 *Am. Econ. J.: Econ. Pol’y* 313, 316 (2014) (“Enforcement could impact the willingness of undocumented parents to interact with public agencies even though their children are eligible for benefits.”).

³¹ Anthony Wallace et al., *Afraid of Assistance: Trump’s Public Charge Rule Sends Chill Through Immigrant Community*, ASU Walter Cronkite Sch. Of Journalism & Mass Comm’n, <https://cronkitezine.asu.edu/bootcamp19/public-charge/index.php/public-charge-story/>.

³² Notice of Public Rulemaking on Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10,570, 10,571 (Feb. 24, 2022) (to be codified at 8 C.F.R. pts. 212 and 245).

Rule, participation in the Supplemental Nutritional Assistance Program (SNAP) of children in mixed-status households dropped by 22.5 percent.³³ These real-life experiences illustrate the difficult decisions immigrant parents will make and the harms the children in amici's communities will suffer as a result of the District Court's vacatur order.

B. When Immigrants Avoid Medical Services, Amici's Long-Term Success And Public Health Both Suffer.

The future success of amici's communities depends on the health and well-being of amici's residents. When immigrants avoid medical care due to fear of immigration consequences, they struggle longer with virulent illnesses than those who seek healthcare.³⁴ Left untreated, they also experience more debilitating—and ultimately more costly—symptoms, especially those who suffer from chronic diseases like diabetes and hypertension that require regular care to be effectively managed.³⁵ And be-

³³ Alexandra Ashbrook, Food Research and Action Ctr., *New Data Reveal Stark Decreases in SNAP Participation Among U.S. Citizen Children Living With a Non-Citizen* (May 2021); <https://frac.org/wp-content/uploads/SNAP-Participation-Among-U.S.-Citizen-Children.pdf>.

³⁴ See Karen Hacker et al., *The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA*, 73 *Soc. Sci. & Med.* 586, 592 (Aug. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3159749/pdf/nihms308839.pdf>.

³⁵ Michael Hiltzik, *Column: A punitive Trump proposal stokes panic among immigrants—even before it's official*, L.A. Times

cause of the pervasive fear of deportation, they experience poorer mental health, which may aggravate physical health conditions and lead to the need for additional mental healthcare services.³⁶

Aggressive immigration policies have historically caused immigrants to avoid enrolling in health insurance.³⁷ When immigrants give up healthcare coverage, the burden of providing medical care falls on local communities. Uninsured individuals who face serious medical problems rely on emergency care provided through amici's safety-net hospitals or emergency medical services.³⁸ The cost of this uncompensated care falls heavily on state and local governments—one 2013 study found that state and

(Aug. 24, 2018), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-public-charge-20180824-story.html>.

³⁶ Becerra, *supra* note 14 at 109, 112; James S. Gordon, *Living in fear of deportation is terrible for your health*, Wash. Post (Feb. 10, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/02/10/living-in-fear-as-a-refugee-in-the-u-s-is-terrible-for-your-health/>.

³⁷ Hamutal Bernstein et al., *Adults in Low-Income Immigrant Families Were Deeply Affected by the COVID-19 Crisis Yet Avoided Safety Net Programs in 2020*, Urban Inst., 8-9 (May 2021), <https://www.urban.org/sites/default/files/publication/104280/adults-in-low-income-immigrant-families-deeply-affected-by-pandemic-yet-avoided-safety-net.pdf>.

³⁸ Teresa A. Coughlin et al., *Uncompensated Care for the Uninsured in 2013: A Detailed Examination*, KFF (May 30, 2014), <https://www.kff.org/uninsured/report/uncompensated-care-for-the-uninsured-in-2013-a-detailed-examination/>.

local programs paid for almost \$20 billion in uncompensated care.³⁹

For the children of immigrant families, many of whom are U.S. citizens, the consequences of avoiding healthcare are dire. Children who cannot access preventive healthcare are more likely to develop health conditions and face difficulties in school. Something as simple as an ear infection, left untreated, can lead to hearing loss or deafness and impair a child's performance in school and ability to interact.⁴⁰ These impediments create real barriers to children's educational and professional development and directly undermine their ability to become financially independent adults.⁴¹ This harms amici, which lose out on the contributions these children otherwise would bring to their communities.

Amici's efforts to maintain the public health also suffer when immigrants fear removal. In a study of New York City immigrants during the COVID-19 pandemic, several respondents said they might avoid giving the names of undocumented persons to government contact tracers.⁴² As another example,

³⁹ *Id.*

⁴⁰ Margaret Edmunds & Molly Joel Coye, *America's Children: Health Insurance and Access to Care* (1998), https://www.ncbi.nlm.nih.gov/books/NBK230381/pdf/Bookshelf_NBK230381.pdf.

⁴¹ Health and Academic Achievement, Ctrs. For Disease Control & Prevention 2-3 (May 2014), <https://perma.cc/3VXF-Y9LC>.

⁴² Alulema & Pavilon, *supra* note 11 at 31.

when studying why tuberculosis patients delay getting treatment, researchers found that fear of immigration authorities was a closely associated factor.⁴³ This reluctance to engage with public health initiatives complicates amici's efforts to eradicate disease.⁴⁴ And logically, communicable diseases are more likely to spread throughout the community when immigrants who contract the disease fear seeking healthcare.⁴⁵

III. AMICI BEAR THE COST OF POORLY PRIORITIZED REMOVALS WHEN IMMIGRANT FAMILIES ARE TORN APART.

The Guidelines wisely give immigration officers discretion to consider the impact of removal on family members in the United States, such as the loss of a provider or caregiver, in deciding whether to remove certain prioritized noncitizens. J.A. 114-15. This discretion reflects the Federal Government's understanding of the real consequences that re-

⁴³ Steven Asch et al., *Does Fear of Immigration Authorities Deter Tuberculosis Patients from Seeking Care?*, 161 W. J. Med. 373, 376 (Oct. 1994), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1022616/pdf/westjmed00062-0027.pdf>.

⁴⁴ *Id.*

⁴⁵ See Helen B. Marrow, The power of local autonomy: expanding health care to unauthorized immigrants in San Francisco, 35 *Ethnic & Racial Stud.* 72, 72 (2012); Kaiser Family Found., *Health Coverage of Immigrants* (Apr. 6, 2022), <https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/>; see also Hoffman, *supra* note 25.

moval may have on close family members, particularly children, including U.S. citizen children of undocumented immigrants.

Those consequences have borne out even in the short time that the Guidelines have been vacated. One undocumented immigrant from Mexico was living in the United States for nearly three decades with his U.S. citizen wife and children and near his elderly parents.⁴⁶ He had a pending request for legal permanent residence and wore an ankle monitor from U.S. Immigration and Customs Enforcement.⁴⁷ After the District Court vacated the Guidelines, immigration officers called him into their office and deported him that same day, tearing him away from his wife, children, and parents, and forcing him to spend several years outside the country and apart from his family while his green card request is processed.⁴⁸

If the District Court's order is not reversed, this troubling story will become commonplace. Nationwide, 22 million people live in mixed-status households.⁴⁹ More than 10 million U.S. citizens share a

⁴⁶ Suzanne Monyak, *Lack of immigration guidance set to ripple through enforcement*, Roll Call (Aug. 4, 2022), <https://roll-call.com/2022/08/04/lack-of-immigration-guidance-set-to-ripple-through-enforcement/>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Rafael Bernal, *Analysis: More than 10 million US citizens live with an undocumented immigrant*, The Hill (Sept. 10, 2021), <https://thehill.com/latino/571649-analysis-more-than-10-million-in-us-live-with-an-undocumented-immigrant>.

home with an undocumented immigrant, and almost 5 million U.S. citizen children have at least one undocumented parent.⁵⁰ As of 2019, in Los Angeles County alone, there were approximately 951,000 undocumented residents, 30% of which—280,000 people—lived with a U.S. citizen child, and 10% of which—95,000 people—were married to a U.S. citizen.⁵¹ That same year, in the City and County of San Francisco, there were approximately 43,000 undocumented people.⁵² Twenty percent of those lived with a U.S. citizen child, and 16% were married to a U.S. citizen.⁵³ And in New York City in 2019, over 1 million people lived in a mixed-status home.⁵⁴

Children in mixed-status families bear the psychological brunt of this uncertainty, living under the ever-present threat that a parent could be removed.⁵⁵ If parents in fact are removed from their

⁵⁰ *Id.*

⁵¹ Migration Policy Inst., *Profile of the Unauthorized Population: Los Angeles County, CA*, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/county/6037>; Los Angeles, Ctr. for the Study of Immigrant Integration, USC Dornsife Coll. of Letters, Arts & Scis., https://dornsife.usc.edu/assets/sites/731/docs/LOSANGELES_web.pdf.

⁵² Migration Policy Inst., *Profile of the Unauthorized Population: San Francisco County, CA*, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/county/6075>.

⁵³ *Id.*

⁵⁴ Mayor's Office of Immigrant Affairs, Annual Report 16 (2019), <https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-Annual-Report-for-2019.pdf>.

⁵⁵ Luis H. Zayas & Laurie Cook Heffron, PhD, *Disrupting Young Lives: How Detention and Deportation Affect US-Born*

families, children are even more likely to experience toxic stress; this impedes brain development and can lead to mental health conditions such as depression and post-traumatic stress disorder, as well as physical ailments like cancer, stroke, diabetes, and heart disease.⁵⁶

When families are separated by removal of a parent, amici suffer because they must divert more resources to assist the children and family members left behind. Single-parent households are more likely to need help with affordable housing and paying for food.⁵⁷ They also are more likely to seek out public benefits.⁵⁸ Though amici invest in public services to assist families in need—for example, the Department of Children and Family Services in Los Angeles County provides resources to help families

Children of Immigrants, Am. Psychological Ass'n (Nov. 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation>.

⁵⁶ Am. Immigration Council, U.S. Citizen Children Impacted by Immigration Enforcement (Nov. 22, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf.

⁵⁷ Sophie Collyer et al., Poverty Tracker, Vulnerabilities and Service Needs of Single-Parent Households in New York City 9, https://www.robinhood.org/wp-content/themes/robinhood/images/poverty-tracker/pdfs/POVERTY_TRACKER_REPORT9.pdf.

⁵⁸ *Id.*

and single parents with necessities, such as child-care and parenting resources⁵⁹—increased demand can put a strain on these investments. And if both parents are removed, care for the child may fall on a fragile network of extended family members, including immigrant grandparents, who must then pursue additional resources to help with their new responsibilities.⁶⁰ Worse still, some children may be forced to enter the foster care system, for which amici bears responsibility.⁶¹

These are all immediate costs that fall disproportionately on local government. But family separation has long-term consequences for amici's prosperity, too. When children suffer the emotional and physical consequences of family separation, amici miss out on the prosperity that those children might otherwise bring. Studies show that the psychologi-

⁵⁹ L.A. Cnty. Dep't of Children & Fam Servs., *Parent Resources*, <https://dcfs.lacounty.gov/parents/parent-resources/>.

⁶⁰ Teresa Wiltz, *If Parents Get Deported, Who Gets Their Children?* The PEW Charitable Trs. (Oct. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/25/if-parents-get-deported-who-gets-their-children>.

⁶¹ Gretchen Gavett, *Study: 5,100 Kids in Foster Care After Parents Deported*, Frontline (Nov. 3, 2011), <https://www.pbs.org/wgbh/frontline/article/study-5100-kids-in-foster-care-after-parents-deported/>.

cal toll of family separation negatively affects children's performance in school.⁶² Studies also show that poorer health and educational outcomes for children lead to reduced potential for future success.⁶³ By contrast, when children achieve greater educational outcomes, particularly college graduation, it translates to wage increases for the whole workforce, faster GDP growth, and greater investment in local goods and services.⁶⁴

Eliminating the Federal Government's discretion to consider the families of noncitizens prioritized for removal will undoubtedly cause families within amici's communities to be torn apart. This harms not only the children and family members left behind, but also the future prosperity of amici's communities.

⁶² T.H. Gindling and Sara Z. Poggio, *The Effect of Family Separation and Reunification on the Educational Success of Immigrant Children in the United States*, Inst. For Study of Labor (Apr. 2010), <https://docs.iza.org/dp4887.pdf>.

⁶³ Sophia Koropecy et al., Am. Acad. of Arts & Scis., *The Economic Impact of Increasing College Completion* 21 (2017), https://www.amacad.org/sites/default/files/publication/downloads/CFUE_Economic-Impact.pdf (demonstrating a correlation between higher rates of college graduation and GDP growth).

⁶⁴ *Id.*; Enrico Moretti, U.C. Berkeley Dep't of Econs., *Social Returns to Education and Human Capital Externalities: Evidence from Cities* 1 (Dec. 1998), [http://darp.lse.ac.uk/PapersDB/Moretti_\(98\).pdf](http://darp.lse.ac.uk/PapersDB/Moretti_(98).pdf); Jonathan Rothwell, *What Colleges Do for Local Economies: A Direct Measure Based on Consumption*, The Brookings Inst. (Nov. 17, 2015), <https://www.brookings.edu/research/what-colleges-do-for-local-economies-a-direct-measure-based-on-consumption/>.

IV. THE DISTRICT COURT ERRED IN VACATING THE GUIDELINES BECAUSE THE GUIDELINES ARE NOT REQUIRED TO UNDERGO NOTICE AND COMMENT.

Both the District Court and Fifth Circuit concluded that the Guidelines are not a general statement of policy and that DHS was required to undergo notice-and-comment rulemaking. But that conclusion was in error for two reasons. First, it rested on an improper legal standard that is inconsistent with this Court’s precedent on general statements of policy. Second, it disregarded the plain text of the Guidelines, which expressly leave room for immigration officers to exercise discretion in implementing the Guidelines and carrying out removals.

The APA’s notice-and-comment requirement does not apply to “general statements of policy.” 5 U.S.C. § 553(b). Under this Court’s longstanding precedent, a general statement of policy is one that “advise[s] 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) (quotation omitted); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 n.31 (1979); *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (holding that interpretive rules are those “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers”); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (same).

And under that standard, the Guidelines are plainly a general statement of policy—they advise

the public prospectively of the manner in which DHS will exercise its discretionary removal power. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (explaining that at “each stage” of the removal process, including “executing removal orders,” the Federal Government “has discretion to abandon the endeavor”).

The District Court and the Fifth Circuit applied an improper standard for determining whether the Guidelines are a general statement of policy. Relying on the Fifth Circuit’s decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (“Texas DAPA”),⁶⁵ both courts looked to the following two criteria: (1) whether the rule “imposes any rights and obligations,” and (2) whether the rule “genuinely leaves the agency and its decision-makers free to exercise discretion.” J.A. 383, 484. But the *Texas DAPA* decision did not rely on Supreme Court precedent in fashioning this rule. And under this Court’s precedent, whether the Guidelines bind individual immigration officers is not relevant to determining whether the Guidelines are a general statement of policy.

Lincoln concerned Congress’s allocation of funds to the Indian Health Service agency to provide healthcare to Native American populations. 508 U.S. at 185. There, the Indian Health Service used some of those funds to build a center for disabled Native American children that served the Southwest.

⁶⁵ DAPA refers to the Deferred Action for Parents of Americans and Lawful Permanent Residents program.

Id. at 186. Under that program, a staff of 11–16 employees made monthly visits to Native American communities in the Southwest. *Id.* Congress never expressly appropriated funds for the center or the program. *Id.* at 187. After a few years in operation, the Indian Health Service terminated the program and reassigned the program staff to provide services nationwide. *Id.* at 188. A group of affected disabled Native American children sued, arguing that the Indian Health Service’s decision to terminate the program and reallocate the funds required notice-and-comment rulemaking. *Id.* at 196.

Rejecting that argument, this Court held that the Indian Health Service’s decision to terminate the program and allocate the funds elsewhere was a general statement of policy. *Id.* at 196–97. In reaching this conclusion, the Court did not consider whether the termination and reallocation decision necessarily would have bound agency employees. But even if the Court had asked that question, the answer would be a resounding “yes”—the decision bound each of the program employees who were reassigned to work a different job providing different services to a different service population. Yet the fact that the Indian Health Service’s decision bound these agency employees did not stop the Court from characterizing the decision as a general statement of policy.

Likewise, in *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), the Court held that an agency guideline was an interpretative rule not subject to notice-and-comment rulemaking, without considering whether the guideline bound agency

employees. The case concerned an informal Medicare reimbursement guideline issued by the Secretary of Health and Human Services (HHS) that called for amortizing a hospital's Medicare reimbursement rather than payment in a lump sum. 514 U.S. at 90. Other regulations required HHS to bear neither more nor less than its fair share of reimbursement costs. *Id.* at 97. Compliance with those regulations required proper timing of reimbursements; if the Secretary were required to reimburse all at once, HHS might not have enough money in any one year to fulfill its regulatory mandate. *Id.* at 98. Though the reimbursement guideline *required* that reimbursements be amortized, *see Guernsey Mem'l Hosp. v. Sullivan*, 796 F. Supp. 283 (S.D. Oh. 1992), the Court nevertheless found that the guideline was a general statement of policy. *Shalala*, 514 U.S. at 99.

Nothing in this Court's precedent requires consideration of whether a rule "genuinely leaves the agency and its decision-makers free to exercise discretion" in determining whether a rule is a general statement of policy or an interpretive rule not subject to notice and comment. The standard that the District Court and Fifth Circuit followed thus cannot be squared with this Court's precedent. As *Lincoln* and *Shalala* show, a rule that binds agency officers to act in a particular way does not mean the rule is not a general statement of policy.

Even setting aside the improper standard applied by the lower courts, the decisions below also were in error because the Guidelines plainly *do* leave DHS and immigration officers free to exercise

discretion in making enforcement decisions. The District Court found that the “smattering of discretionary language” in the Guidelines was “inconsistent with the mandatory language throughout the document, making clear that the priorities and factors are not optional,” J.A. 385, and the Fifth Circuit similarly faulted the Guidelines for “removing DHS personnel’s discretion to stray from the guidance,” J.A. 484. But these findings ignore the plain text of the Guidelines.

The Guidelines instruct immigration officers to analyze aggravating and mitigating factors in deciding who should be prioritized for removal. J.A. 113-15. The Guidelines also expressly “reflect[] a determination that officers and agents need the discretion to make case-by-case determinations to identify who poses a threat.” J.A. 162. And the Guidelines explain, no fewer than three times, that whether enforcement is appropriate in a particular case is an individualized determination that “is not to be determined according to bright lines or categories,” but “instead requires an assessment of the individual and the totality of the facts and circumstances.” J.A. 113, 115 (“Again, our personnel must evaluate the individual and totality of the facts and circumstances and exercise their judgment accordingly.”), J.A. 116 (“In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.”).

The memorandum that DHS released with the Guidelines further explains how DHS crafted the Guidelines to afford discretion to immigration officers. The memorandum notes, for example, that the Federal Government dispensed with a pre-approval process (part of the prior set of enforcement priorities) in response to feedback from immigration officers who sought additional flexibility in exercising their judgment. J.A. 162. The memorandum also explains that the Federal Government rejected an alternative “checklist” approach that would require immigration officers to remove only those noncitizens who have been identified as priorities by the Federal Government; as the memorandum explains, this approach was disfavored because it “has the disadvantage of foreclosing a more nuanced, individualized assessment of each noncitizens’ aggravating and mitigating attributes, and therefore risks over-inclusive and underinclusive decisionmaking” J.A. 163. Instead of restricting immigration officers’ discretion in these ways, the Federal Government chose an approach that afforded officers *more* discretion.

As the Sixth Circuit recognized when it reversed a preliminary injunction of the Guidelines, the Guidelines have the “telltale signs all of a nonbinding policy statement” *Arizona v. Biden*, 40 F. 4th 375, 388 (6th Cir. 2022). Simply put, the “guidance does not compel an action to be taken or not taken. Instead, the guidance leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel.” J.A. 118. The District Court’s finding that the Guidelines bind immigration officers, and

thus required notice and comment, was in error and should be reversed.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Federal Government's brief, amici urge this Court to reverse the decision below.

Respectfully submitted,

DANIEL R. SUVOR
Counsel of Record
JAMES A. BOWMAN
KELSEY A. CHANDRASOMA
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
(213) 430-6000
dsuvor@omm.com
jbowman@omm.com
kchandrasoma@omm.com

*Counsel for Amicus Curiae
County of Los Angeles, Calif.*

*Additional Counsel Listed in
Appendix*

September 19, 2022

APPENDIX

APPENDIX A

LIST OF AMICI CURIAE

DANIEL R. SUVOR
JAMES A. BOWMAN
O'MELVENY & MYERS
LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071

*Attorney for County of Los
Angeles, California*

NICHOLAS HERMAN
General Counsel
1526 E. Franklin St.,
Suite 200
Chapel Hill, NC 27514

*Attorney for Town of
Carrboro, North Carolina*

CHERYL WATSON FISHER
City Solicitor
500 Broadway, Room 307
Chelsea, MA 02150

*Attorney for City of Chelsea,
Massachusetts*

HON. SYLVIA O. HINDS-
RADIX
Corporation Counsel
100 Church Street
New York, NY 10007

*Attorney for City of New
York, New York*

BARBARA J. PARKER
City Attorney
One Frank Ogawa Plaza,
Sixth Floor
Oakland, CA 94612

*Attorney for City of
Oakland, California*

KRYSIA M. KUBIAK
Solicitor
City County Building
414 Grant Street
Pittsburgh, PA 15219

*Attorney for City of
Pittsburgh, Pennsylvania*

CELIA MEZA
Corporation Counsel
2 N. LaSalle Street,
Suite 580
Chicago, IL 60602

*Attorney for City of
Chicago, Illinois*

MARY ANN MCNETT
MASON
County Counsel
Administration Building
1025 Escobar St., 3rd Fl.
Martinez, CA 94553

*Attorney for County of
Contra Costa, California*

N. LYNN BOARD
City Attorney
31 S. Summit Avenue
Gaithersburg, MD 20877

*Attorney for City of
Gaithersburg, Maryland*

JEFFREY DANA
City Solicitor
444 Westminster Street,
Suite 220
Providence, RI 02903

*Attorney for City of
Providence, Rhode Island*

ROBERT L. TAYLOR
City Attorney
1221 SW Fourth Avenue,
Suite 430
Portland, OR 97204

*Attorney for City of
Portland, Oregon*

SUSANA ALCALA WOOD
City Attorney
915 I Street,
Fourth Floor
Sacramento, CA 95814

*Attorney for City of
Sacramento, California*

DANIEL T. SATTERBERG
Prosecuting Attorney
1191 Second Avenue,
Ste. 1700
Seattle, WA 98101

*Attorney for County of King,
Washington*

MICHAEL FEUER
City Attorney
200 North Main Street
City Hall East Suite 800
Los Angeles, CA 90012

*Counsel for Amicus Curiae
City of Los Angeles,
California*

MICHAEL R. HAAS
City Attorney
210 Martin Luther King
Jr. Blvd., Room 401
Madison, WI 53703

*Attorney for City of
Madison, Wisconsin*

MARA W. ELLIOTT
City Attorney
1200 Third Avenue,
Suite 1620
San Diego, CA 92101

*Attorney for City of San
Diego, California*

DAVID CHIU
City Attorney
City Hall Room 234
One Dr. Carlton B.
Goodlett Pl.
San Francisco, CA 94102

*Attorney for City and
County of San Francisco,
California*

DELIA GARZA
County Attorney
P.O. Box 1748
Austin, TX 78701

*Attorney for County of
Travis, Texas*

4a

MARGARET C. DAUN
Corporation Counsel
901 N. 9th Street, Room
303
Milwaukee, WI 53233

*Attorney for County of
Milwaukee, Wisconsin*

LESLIE J. GIRARD
County Counsel
168 West Alisal Street,
3rd Floor
Salinas, CA 93901

*Attorney for County of
Monterey, California*

JOHN DANIEL REAVES
General Counsel
1750 K Street, N.W.,
11th Floor
Washington, DC 20006

*Attorney for U.S.
Conference of Mayors*