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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

Civil Action No. 3:21-CV-00168

[Filed: October 8, 2021]

SHERIFF BRAD COE in his official capacity and KINNEY COUNTY, TEXAS; SHERIFF J.W. GUTHRIE in official capacity and EDWARDS COUNTY, TEXAS; SHERIFF EMMETT SHELTON in his official capacity and MCMULLEN COUNTY, TEXAS; SHERIFF ARVIN WEST in his official capacity and HUDSPETH COUNTY, TEXAS; SHERIFF LARRY BUSBY in his official capacity and LIVE OAK COUNTY, TEXAS; SHERIFF NATHAN JOHNSON in his official capacity and REAL COUNTY, TEXAS; GALVESTON COUNTY, TEXAS; THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION,	)
Plaintiffs,	)

v.

JOSEPH R. BIDEN, JR., President, in his official capacity; THE UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TROY MILLER, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION,

Defendants.

SECOND AMENDED COMPLAINT

INTRODUCTION

1. Plaintiffs are sheriffs of Texas counties in their official capacity and Texas counties, as well as the Federal Police Foundation, ICE Officers Division, an association of U.S. Immigration and Customs Enforcement ("ICE") officers.

2. On January 20, 2021, the first day of the Biden

Administration, the acting secretary of the U.S. Department of Homeland Security ("DHS") issued a memorandum ordering a department-wide review of "policies and practices concerning immigration enforcement." *See* DHS Memorandum: Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities, at 2, available at: https://www.dhs.gov/sites/default/files/publications/21_0120_enforcementmemo_ signed.pdf ("January 20 Memorandum"). The January 20 Memorandum also established "interim enforcement priorities" pending the outcome of the policy review and ordered an "immediate pause on removals . . . for 100 days." *Id.* at 2-3.

3. The January 20 Memorandum established three interim enforcement priorities:

> 1. **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.
> 2. **Border security.** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.
> 3. **Public safety.** Individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an "aggravated felony," as that term is defined in

> section 101(a)(43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety.

Id. at 2. These priorities:

> apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole.

Id.

4. On February 18, 2021, Acting Director of ICE Tae Johnson issued a Memorandum to all ICE employees entitled "Interim Guidance: Civil Immigration Enforcement Removal and Priorities," available at: https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf ("February 18 Memorandum"). The Memorandum provides guidance on how to implement the enforcement priorities of the January 20 Memorandum and instructs ICE officers to refrain from placing aliens who are unlawfully present in the United States ("illegal aliens") into removal proceedings or from taking custody of such aliens unless they fall into very narrow categories of "cases that are presumed to be priorities." Those cases consist principally of illegal aliens who pose a national security or terrorist threat to the United States, have been convicted of an aggravated felony as defined by section

101(a)(43) of the Immigration and Nationality Act) ("INA") (codified at 8 U.S.C. § 1101(a)(43)), or have recently arrived in the United States unlawfully (defined as those aliens who enter or attempt to enter the United States on or after November 1, 2020).

5. According to the February 18 Memorandum, taking *any* enforcement action against illegal aliens falling outside of these narrow priority categories requires an ICE officer to obtain preapproval from a high-ranking field office director ("FOD") or special agent in charge ("SAC") *before* taking action. The ICE officer must go through the time-consuming and usually futile process of "rais[ing] a written justification through the chain of command, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place."

6. In implementing the February 18 Memorandum, ICE Defendants formalized the process whereby ICE officers could apply for preapproval to take an enforcement action against aliens falling outside of the priority categories, by creating the Arrest Authorization Request Tool (AART) system for officers to apply for preapproval using ICE computers. The AART process is extremely burdensome and time consuming and has had the effect of discouraging ICE Officers from even attempting to apply for preapproval.

7. In some ICE field offices, officers have been required to obtain approval from their supervisors before even beginning the AART request process. Typically, they must send an email to their supervisors

and then receive permission to start the AART process. In effect, those officers must obtain pre-preapproval, as well as pre-approval, to take any enforcement action against a non-priority alien.

8. Shortly after the issuance of the February 18 Memorandum, in approximately March of 2021, U.S. Customs and Border Protection (CBP) Defendants implemented a dramatic shift in enforcement practices. The Border Patrol in certain southwest border sectors began issuing new Notices to Report ("NTRs") to illegal aliens, rather than Notices to Appear ("NTAs"). Unlike the NTA, an NTR is not a charging document and does not start a removal proceeding. The NTR merely asks the alien to report to an ICE office within 60 days. In the unlikely event that the alien actually shows up at an ICE office, the ICE officer dealing with the alien is supposed to issue an NTA and initiate the removal proceeding.

9. At the same time, shortly after the issuance of the February 18 Memorandum, CBP implemented a policy of declining to detain illegal aliens apprehended at the southern border who are not expeditiously removed under 8 U.S.C. § 1225(b)(1) or directed to remain in Mexico under 8 U.S.C. § 1225(b)(2)(C).

10. As a result of the February 18 Memorandum and its implementation, the number of arrests and removals by ICE dropped precipitously, to levels one-third of what they were prior to the beginning of the Biden Administration. In April 2021, ICE carried out fewer than 3,000 arrests, the lowest number on record. ICE's approximately 6,000 officers were reported to be averaging one arrest every two months. (*Washington*

Post, "Biden administration reins in street-level enforcement by ICE as officials try to refocus agency mission," May 25, 2021, available at https://archive.is/NeSHE#selection-33.0-333.104). This compares to an average of 8,634 arrests per month by ICE in FY 2020. *ICE Annual Report*, FY 2020 at 5 (showing 103,603 administrative arrests for the year) (available at: https://www.ice.gov/doclib/news/library/reports/annual-report/ iceReportFY2020.pdf).

11. This standdown in ICE enforcement, along with CBP replacing NTAs with NTRs in some sectors and CBP failing to detain illegal aliens in all sectors, has fueled a crisis at the border and in other Texas counties, encouraging a massive surge in illegal immigration. Monthly totals in apprehensions by Border Patrol agents are at levels not seen in over 21 years. In March 2021, Border Patrol agents apprehended 173,337 aliens after they illegally entered the United States. In April 2021, the number was 178,854. In May 2021, the number was 180,034. In June 2021, the number was 189,020. In July 2021, the number was 213,534. And in August 2021, the number was 208,887. This compares to 50,014 during August 2020— or more than four times the previous year's total. (Official statistics are available at: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters).

12. On September 30, 2021, Defendant DHS Secretary Alejandro Mayorkas issued a Memorandum entitled "Guidelines for the Enforcement of Civil Immigration Laws" available at https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf

("September 30 Memorandum"). The September 30 Memorandum stated that it would take effect on November 29, 2021, and would on that date serve to rescind the January 20 and February 18 Memoranda. *See id*. at 6.

13. The September 30 Memorandum identified the same three priority enforcement categories found in the previous Memoranda: threats to national security, threats to public safety, and threats to border security. *Id*. at 3-4. However, the September 30 Memorandum modified the February 18 Memorandum so that *even priority category aliens cannot be presumptively subjected to enforcement actions*. Instead "investigative work" must be done before any enforcement action is taken; the September 30 Memorandum states that "our personnel should, to the fullest extent possible, obtain and review the totality of the facts and circumstances of the conduct at issue. The gravity of an apprehension and removal on a noncitizen's life, and potentially the life of family members and the community, warrants the dedication of investigative and evaluative effort." *Id*. at 4.

14. Although the September 30 Memorandum does not describe the approval process whereby "the totality of the facts and circumstances" will be assessed prior to taking enforcement actions, the AART system has remained in effect post-September 30, 2021. In addition, it is the understanding of ICE officer members of the Federal Police Foundation, based on the statements of Defendant Secretary Mayorkas and the actions of ICE leadership, that the AART system will continue to be utilized prior to ICE officers being

permitted to take enforcement actions after November 29, 2021. In virtually every case, the "discretion" described in the September 30 Memorandum will not permit ICE officers to take any enforcement actions without first obtaining approval from their supervising officers.

15. Importantly, in the threat to public safety category, the September 30 Memorandum made a significant change; the fact that an illegal alien has been convicted of an aggravated felony would no longer be sufficient to allow an officer to take an enforcement action. As the Memorandum stated: "Our personnel should not rely on the fact of conviction or the result of a database search alone." *Id*. at 4.

16. The September 30 Memorandum made clear repeatedly that a conviction for an aggravated felony, in and of itself, would not justify taking an enforcement action against such aliens. The Memorandum stated, "Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories." *Id*. at 3. Instead, "mitigating factors that militate in favor of declining enforcement action" would have to be considered." The Memorandum listed the following examples of such factors:

- advanced or tender age;
- lengthy presence in the United States;
- a mental condition that may have contributed to the criminal conduct…;
- status as a victim of crime or victim, witness,

or party in legal proceedings;

• the impact of removal on family in the Unites states, such as loss of provider…:

• whether the noncitizen may be eligible for humanitarian protection…;

• military or other public service of the noncitizen or their immediate family;

• time since an offense and evidence of rehabilitation;

• conviction was vacated or expunged.

Id. at 3-4.

17. The September 30 Memorandum also listed a smaller number of aggravative factors that could be considered in cases where an alien was convicted of a crime:

• the gravity of the offense of conviction and the sentence imposed;

• the nature and degree of harm caused by the criminal offense;

• the sophistication of the criminal offense;

• use or threatened use of a firearm or dangerous weapon;

• a serious prior criminal record.

Id. at 3.

18. Plaintiff sheriffs and Texas counties experienced a dramatic increase in the influx of illegal aliens and in criminal activity by illegal aliens resulting from the implementation of the unlawful and unconstitutional January 20 and February 18 Memoranda and the related standdown of federal immigration enforcement.

19. When Plaintiff sheriffs or their deputies arrest illegal aliens who have committed crimes, their offices inform ICE, or in some cases CBP. Prior to the January 20 Memorandum and the February 18 Memorandum, ICE issued detainer requests and/or took custody of such aliens and initiated removal proceedings against them as the Immigration and Nationality Act (INA) requires.

20. Since the issuance of the February 18 Memorandum, ICE officers have been unable to take custody of, or issue detainer requests for, dangerous criminal aliens whose detention is mandated by 8 U.S.C. §1226(c). Specifically, detention is required for aliens who have committed or been convicted of numerous crimes other than aggravated felonies, such as: crimes of moral turpitude, crimes involving controlled substances, human trafficking, money laundering, and certain firearm offenses. *Id*.; *see also* 8 U.S.C. §§ 1182(a)(2) and 1227(a)(2) (listing crimes that render aliens inadmissible or deportable, respectively). Written requests for preapproval to take enforcement actions against such non-priority criminal aliens are

systematically denied by FODs and SACs.

21. The September 30 Memorandum specifically stated that a conviction for a crime of moral turpitude (domestic violence) would no longer be sufficient to justify taking an enforcement action against such an alien criminal: "For example, a categorical determination that a domestic violence offense compels apprehension and removal could make victims of domestic violence more reluctant to report the offense conduct. The specific facts of a case should be determinative." September 30 Memorandum, at 4. As is further explained below, this violates 8 U.S.C. §1226(c)(1)(A), which categorically makes the detention of such an alien mandatory, regardless of any specific facts.

22. Prior to the January 20 Memorandum and the February 18 Memorandum, ICE officers routinely issued detainers to take custody of illegal aliens who, after being arrested and charged with crimes by local law enforcement, had posted bond, thereby keeping dangerous criminal aliens off the streets and ensuring that such aliens were eventually removed from the country. Since then, ICE officers have not been permitted to take custody of such illegal aliens.

23. Prior to the January 20 Memorandum and the February 18 Memorandum, ICE officers routinely took custody of criminal aliens who, after serving time for the commission of state crimes, were about to be released. ICE officers were contacted by local law enforcement so that ICE could take custody of the aliens upon their release and remove them from the country. Since then, in many cases ICE officers have

not been permitted to take custody of such criminal aliens. As a result, numerous criminal aliens have been released onto the streets.

24. In addition, since the issuance of the February 18 Memorandum, ICE officers have no longer been permitted to take custody of most of the inmates in Plaintiffs' jails who previously would have been transferred to ICE as a result of the "287(g)" agreements between those counties and ICE (referring to 8 U.S.C. § 1357(g)).

25. In a wide variety of other circumstances, ICE officers are, contrary to federal statute, no longer permitted to remove dangerous illegal aliens who present a criminal threat because those aliens do not fall into the very narrow categories of "cases that are presumed to be priorities" under the February 18 Memorandum. After the September 30 Memorandum becomes effective, even public safety priority aliens will not be subjected to enforcement action without preapproval through the AART system, or preapproval through a similar process whereby the various aggravating mitigating factors are weighed prior to any enforcement action. *See* September 30 Memorandum, at 3-4.

26. Plaintiff sheriffs are no longer able to present to ICE criminal aliens for detention or removal and expect them to be detained or removed.

27. The detention costs, crime response costs, crime investigation costs, and related costs experienced by the Plaintiff sheriffs and counties have consequently increased dramatically for at least four related reasons:

(1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE is no longer taking custody of illegal aliens who have committed crimes in the counties, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the counties encouraged by Defendants' shutdown of immigration enforcement.

28. On May 31, 2021, as a result of the criminal activity and other adverse consequences of the surge in illegal immigration, Texas Governor Greg Abbott issued a proclamation of disaster covering 34 Texas counties. On June 25, 2021, the Governor issued an amended proclamation of disaster covering 28 Texas counties. On July 1, 2021, the Governor issued another amended proclamation of disaster covering 35 Texas counties. Every county represented in this complaint is included in the disaster areas described in the second and third proclamations.

29. As detailed below, the February 18 and September 30 Memoranda command ICE officers to violate the specific terms of several federal immigration statutes, violate the Administrative Procedure Act ("APA"), and violate the obligation of the executive branch faithfully to execute the law, as required by Article II, Section 3, of the United States Constitution.

30. Plaintiffs bring this civil action to seek injunctive relief preventing the continued implementation of the unlawful and unconstitutional January 20, February 18, and September 30 Memoranda and requiring, instead, ICE and CBP leadership to detain and/or remove illegal aliens as

required by federal law.

THE PARTIES

Plaintiffs

31. Plaintiff Brad Coe is the Sheriff of Kinney County, Texas, acting in his official capacity. The Kinney County Sheriff's Office is located at 109 North Street, Brackettville, Texas. The Sheriff's Office operates the Kinney County Jail, which can house 14 inmates and is used to detain individuals arrested for the commission of crimes in Kinney County.

32. Plaintiff Kinney County, Texas, is a county of 1,365 square miles with a population of 3,598 in the 2010 census.

33. Plaintiff J.W. Guthrie is the Sheriff of Edwards County, Texas, acting in his official capacity. The Edwards County Sheriff's Office is located at 404 West Austin Street, Rocksprings, Texas. The Sheriff's Office operates the Edwards County Jail, which can house 20 inmates and is used to detain individuals arrested for the commission of crimes in Edwards County.

34. Plaintiff Edwards County, Texas, is a county of 2,118 square miles with a population of 2,002 in the 2010 census.

35. Plaintiff Emmett Shelton is the Sheriff of McMullen County, Texas, acting in his official capacity. The McMullen County Sheriff's Office is located at 401 Main Street, Tilden, Texas. The Sheriff's Office detains individuals arrested for the commission of crimes in

McMullen County in the jails of Live Oak County and Atascosa County at a cost of $55.00 and $48.00 per day, per inmate, respectively.

36. Plaintiff McMullen County, Texas, is a county of 1,157 square miles with a population of 707 in the 2010 census.

37. Plaintiff Arvin West is the Sheriff of Hudspeth County, Texas, acting in his official capacity. The Hudspeth County Sheriff's Office is located at 525 N. Wilson Avenue, Sierra Blanca, Texas. The Sheriff's Office operates the Hudspeth County Jail, which can house 103 inmates and is used to detain individuals for the commission of crimes in Hudspeth County.

38. Plaintiff Hudspeth County, Texas, is a county of 4,572 square miles with a population of 3,426 in the 2010 census.

39. Plaintiff Larry Busby is the Sheriff of Live Oak County, Texas, acting in his official capacity. The Live Oak County Sheriff's Office is located at 200 Larry R. Busby Drive, George West, Texas. The Sheriff's Office operates the Live Oak County Jail, which can house 96 inmates and is used to detain individuals for the commission of crimes in Live Oak County and other counties.

40. Plaintiff Live Oak County, Texas, is a county of 1,079 square miles with a population of 11,531 in the 2010 census.

41. Plaintiff Nathan Johnson is the Sheriff of Real County, Texas. The Real County Sheriff's Office is located at 146 Highway 83 South, Leakey, Texas. The

Sheriff's Office operates the Real County Jail, which can house three inmates and is used to detain individuals arrested for the commission of crimes in Real County. The Sheriff's Office also detains individuals arrested for the commission of crimes in Real County in the jails of Uvalde, Bandera, Edwards, Kerr, Dimmit, Val Verde Counties, at a cost ranging from $56.00 to $80.00 per day, per inmate.

42. Plaintiff Real County, Texas, is a county of 700 square miles with a population of 3,309 in the 2010 census.

43. Plaintiff Galveston County, Texas, owns and operates the Galveston County Jail through the Galveston County Sheriff's Office. The Galveston County Jail can house up to approximately 1,171 inmates. It costs Galveston County $69.43 per person, per day, to detain someone in the Galveston County Jail.

44. Plaintiff Galveston County, Texas, is a county of 873 square miles with a population of 291,309 in the 2010 census and an estimated population of 342,139 in 2019.

45. Plaintiff sheriffs have each taken an oath of office pursuant to Article XVI, § 1(a) of the Texas Constitution and § 85.001 of the Texas Local Government Code to execute faithfully the duties of their office and, to the best of their ability, to preserve, protect, and defend the Constitution and laws of the United States and of Texas.

46. Plaintiff Federal Police Foundation is a nonprofit association of federal law enforcement

officers registered in the State of Delaware. The purposes of the Federal Police Foundation include, *inter alia*, conducting research, informing federal law enforcement officers about legal and policy issues affecting their work, and informing the public about federal law enforcement matters. The ICE Officers Division of the Federal Police Foundation includes members who are ICE officers actively serving in immigration law enforcement and who are being compelled to implement the January 20, February 18, and September 30 Memoranda in violation of federal law. Members of the Federal Police Foundation, ICE Officers Division, are serving in the Southern District of Texas.

Defendants

47. Defendants are the United States of America, President Joseph R. Biden, Jr., and officials in the U.S. Department of Homeland Security ("DHS"). All Defendants are sued in their official capacity only.

48. Defendant Joseph R. Biden, Jr. is the President of the United States and is responsible for taking care that the laws of the United States are faithfully executed.

49. Defendant United States of America is the federal sovereign.

50. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and the head of DHS and in his official capacity is responsible for the enforcement of federal immigration laws, 6 U.S.C. § 112, 8 U.S.C. § 1101, *et seq.*, pursuant to 8 U.S.C. § 1103(a)(2).

51. Defendant U.S. Department of Homeland Security oversees ICE and CBP in their enforcement of federal immigration laws.

52. Defendant Tae Johnson is the Acting Director of ICE and in his official capacity is responsible for administering all operations of ICE.

53. Defendant ICE is the component agency of DHS that is principally responsible for the enforcement of federal immigration and customs laws in the interior of the United States, including the removal of those aliens not lawfully present in the United States.

54. Defendant Troy Miller is the Acting Commissioner of CBP and in his official capacity is responsible for administering all operations of CBP.

55. Defendant CBP is the component agency of DHS that is principally responsible for the enforcement of federal immigration laws at the international borders of the United States, for managing and protecting and those borders, and for overseeing customs enforcement at international ports of entry.

56. Defendant Johnson issued the February 18 Memorandum. Defendant Johnson is not authorized to promulgate regulations implementing the Immigration and Nationality Act in the Department of Homeland Security.

57. Defendant Mayorkas is the official authorized to promulgate regulations implementing the Immigration and Nationality Act in the Department of Homeland Security.

JURISDICTION AND VENUE

58. This Court has subject matter jurisdiction over Plaintiffs' claims under the Constitution and laws of the United States pursuant to 28 U.S.C. §§ 1331 and 1361 and 5 U.S.C. §§ 702 and 703. This Court is authorized to grant Plaintiffs' requests for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 1361, 2201, and 2202 and 5 U.S.C. §§ 705 and 706.

59. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because the Plaintiffs named in this complaint are sheriffs of Texas counties who reside and exercise their law enforcement duties in the State of Texas, or counties in the State of Texas. McMullen County, Live Oak County, and Galveston County are in the Southern District of Texas. Plaintiff Federal Police Foundation, ICE Officers Division, includes members who are ICE officers serving in the Southern District of Texas. Galveston County is the location of the Galveston Division of the Southern District of Texas.

THE THREE MEMORANDA AND RELATED EVENTS

60. The January 20 Memorandum did not consider any of the significant harms that the States, their political subdivisions, government officials such as county sheriffs, or the public would face as a result of DHS listing such a narrow set of enforcement priorities, including its failure to take custody, as required by federal law, of certain illegal aliens arrested by local law enforcement agencies and its failure to initiate removal proceedings against illegal

aliens whose removal is required by federal law.

61. The January 20 Memorandum was issued without notice and comment as required under the APA.

62. On February 18, 2021, Acting Director of ICE Tae Johnson issued the February 18 Memorandum providing guidance on how ICE was to implement the enforcement priorities iterated in the January 20 Memorandum.

63. The February 18 Memorandum stated that it "shall be applied to all civil immigration enforcement and removal decisions," including "whether to issue a detainer [or] assume custody of a noncitizen subject to a previously issued detainer," "whether to issue, serve, file, or cancel a Notice to Appear," "whether to stop, question, or arrest" an alien for violating immigration laws, and "whether to detain or release from custody subject to conditions." February 18 Memorandum at 3.

64. The February 18 Memorandum retained the three enforcement priority categories adopted in the January 20 Memorandum and added criminal gang members to the public safety category. *Id.* at 4-5. Thus, the only priority enforcement categories consisted of 1) terrorists, spies, or other national security risks; 2) recent arrivals (defined as those aliens who enter or attempt to enter the United States on or after November 1, 2020); and 3) aggravated felons and criminal gang members who pose a risk to public safety. *Id.*

65. The February 18 Memorandum directed immigration officers to exercise their discretion in

taking enforcement actions against aliens who fall within one of the three priority categories but requires preapproval by a FOD or SAC before any enforcement action may be taken against an alien who falls outside those priority categories. *Id.* at 5-6.

66. Regarding non-priority aliens an ICE officer encounters, the February 18 Memorandum purported to narrow the options available to the ICE officer: either seek preapproval to take enforcement actions or take no enforcement action at all. These restrictions on taking enforcement actions apply even where federal law makes detention and/or removal of the aliens *mandatory*.

67. The February 18 Memorandum did not consider any of the significant harms that the States, counties, county sheriffs, their respective offices, or the public would face as a result of ICE no longer obeying federal statutes requiring the mandatory detention and removal of certain illegal aliens, including its failure to take custody of certain illegal aliens arrested by local law enforcement agencies and its failure to initiate removal proceedings against illegal aliens whose removal is required by federal law.

68. The February 18 Memorandum was issued without the notice and comment that the APA requires.

69. The February 18 Memorandum stated that Defendant Secretary Mayorkas anticipated issuing new enforcement guidelines in less than 90 days. February 18 Memorandum, at 1. It was more than 220 days later when he issued the enforcement guidelines contained in the September 30 Memorandum.

70. The September 30 Memorandum did not consider any of the significant harms that the States, counties, county sheriffs, their respective offices, or the public would face as a result of ICE no longer obeying federal statutes requiring the mandatory detention and removal of certain illegal aliens, including its failure to take custody of certain illegal aliens arrested by local law enforcement agencies and its failure to initiate removal proceedings against illegal aliens whose removal is required by federal law.

71. The September 30 Memorandum was issued without the notice and comment that the APA requires.

72. The replacement of NTAs with NTRs in some Border Patrol sectors was done without consideration of any of the significant harms that the States, counties, county sheriffs, their respective offices, or the public would face as a result of CBP no longer obeying federal statutes requiring the mandatory detention and removal of certain illegal aliens, including its failure to initiate removal proceedings against illegal aliens whose removal is required by federal law.

73. The INA does not grant Defendants the authority to replace NTAs with NTRs, but even if it did, Defendants failed to enact that substantive policy by complying with the APA's notice and comment requirement.

74. Defendants are no longer requiring ICE and CBP officers to detain or initiate removal proceedings against large numbers of illegal aliens whose detention and/or removal is required by federal law.

75. After the January 20 Memorandum,

Defendants began reviewing all cases in which detainer requests ("detainers") had been placed on illegal aliens in state or local custody. Detainers are formal requests that those aliens be transferred to ICE custody and that those aliens not be released. This review, which continued under the February 18 Memorandum and is contemplated by the September 30 Memorandum, is to determine if the relevant aliens fit within the priority enforcement categories. If the alien does not, ICE lifts the detainer. As a result, hundreds, if not thousands, of detainers on criminal aliens have been lifted since January 20, 2021.

76. After the February 18 Memorandum, ICE officers in at least one field office were ordered to identify all NTAs that had been issued regarding aliens who did not fall within the three priority categories and to present those cases to their front-line supervisors. The front-line supervisors then cancelled those NTAs that fell outside of the three priority categories. This screening and cancellation of NTAs that were previously issued has continued to the date of this filing, including after the September 30 Memorandum.

77. The preapproval process established by the February 18 Memorandum is intended to discourage ICE officers from taking enforcement actions required by law, and FODs and SACs have rarely granted preapproval for enforcement actions against non-priority aliens.

78. In the very rare cases in which ICE FODs and SACs actually grant preapproval, the length of time taken has been extraordinarily long. For example, in one of the cases in which preapproval was granted,

involving an alien charged with the rape of a child, the request for preapproval was submitted on May 6, 2021. Preapproval was not granted until 53 days later, on June 28, 2021.

79. The time-consuming paperwork and the low probability of preapproval being granted have caused many ICE officers not even to attempt to seek preapproval.

80. Many extremely dangerous illegal aliens who would have been detained prior to the February 18 Memorandum consistent with federal statutes are now being released from custody, against the judgment of the ICE officers seeking to detain them, and in violation of federal statutes requiring their detention and/or removal. Several illustrative cases (with names omitted) from ICE offices in Texas and other States are as follows.

81. Case A involves an illegal alien who was previously deported twice and is in local custody facing pending charges for aggravated assault. ICE officers put a detainer in place to request custody, prior to the beginning of the Biden Administration. At some point after January 20, 2021, an evaluation of all cases was ordered. Following this evaluation, ICE officers were directed to remove the detainer because detaining the alien did not meet the requirements of the February 18 Memorandum.

82. Case B involves an illegal alien who was previously deported four times and has again returned to the United States. He has been convicted of domestic violence, evading arrest, and multiple counts of driving

under the influence. He now has an additional driving under the influence charge pending. ICE officers requested preapproval to place a detainer on the alien under the February 18 Memorandum process. ICE management denied the request. As a result, this dangerous, previously-deported, criminal alien remains on the street, able to drive under the influence once again.

83. Case C involves an illegal alien who is a fugitive with a final order of removal and who faces a pending local charge of aggravated assault. ICE officers initiated the time-consuming preapproval process in the hope of detaining him prior to his release on bond. However, the subject posted bond before ICE management issued a decision on the preapproval request. This dangerous illegal alien is now at large.

84. Case D involves an illegal alien who was previously deported and has returned to the United States. He has been convicted of sexual battery against a child. ICE officers requested preapproval to make an arrest under the February 18 Memorandum process. ICE management denied their request. As a result, this dangerous, previously-deported, criminal alien remains on the street.

85. Case E involves an illegal alien who was previously deported two times and returned to the United States. Local police initiated an arrest of the alien for the sale of heroin. The alien attempted to evade arrest by ramming the police car with his vehicle, nearly hitting an officer who was standing outside of the police car. The alien was eventually arrested and found to have a quarter of a pound of

heroin in his possession, as well as a female and a baby in the back seat of his vehicle. He faces pending local charges of distribution of heroin, aggravated assault, endangerment of a child, and failure to stop at the command of police. ICE officers requested preapproval to place a detainer on the illegal alien in order to detain him when he is released from local custody. ICE management denied the preapproval request.

86. Case F involves an illegal alien who was previously deported and has returned to the United States. He has been convicted of sexual assault of a minor under 14. ICE officers requested preapproval to make an arrest under the February 18 Memorandum process. ICE management denied their request, stating that the alien's conviction was too old to warrant his removal. As a result, this dangerous, previously-deported, criminal alien remains on the street.

87. Case G involves an illegal alien who was previously deported and has returned to the United States. He was convicted of indecency with a child with sexual contact and sentenced to 5 years of confinement. He was also registered as a sex offender for life. Prior to the beginning of the Biden Administration, the relevant ICE officer initiated an investigation of the case. At some point after January 20, 2021, an evaluation of all pending cases was ordered. Following the issuance of the February 18 Memorandum, the ICE officer determined that it would be futile to file an AART request to obtain preapproval. As a result, this dangerous, previously-deported, criminal alien remains on the street.

88. Case H involves an illegal alien who was

previously deported and has returned to the United States. He has been convicted of alien smuggling (an aggravated felony) and theft. ICE officers requested preapproval to make an arrest under the February 18 Memorandum process. ICE management denied their request, stating that the alien's conviction was too old to warrant his removal and that he did not pose an immediate threat to public safety. As a result, this dangerous, previously-deported, criminal alien remains on the street.

89. Since the issuance of the February 18 Memorandum, many detainers that were in place for criminal aliens have since been lifted because they were deemed not to meet the threshold for enforcement under the February 18 Memorandum. The crimes committed by illegal aliens whose detainers have been lifted include, *inter alia*: aggravated sexual assault on a child, aggravated assault with a deadly weapon, larceny, burglary, domestic violence, carrying a prohibited weapon, possession of amphetamines, possession of cocaine, possession of heroin, possession of marijuana, resisting a law enforcement officer, and driving under the influence.

90. Since the issuance of the February 18 Memorandum, CBP officers have been constrained from taking enforcement actions against illegal aliens who are apprehended crossing the border, including aliens who fall within the priority categories of the February 18 and September 30 Memoranda. Detention of such aliens and the institution of removal proceedings are required by federal statute, but contrary to law, Defendants have ordered CBP officers

to release the aliens into the United States without detaining the aliens or taking steps to initiate removal proceedings.

91. The replacement of NTAs with NTRs has enabled illegal aliens entering the country to ignore the NTR without facing the consequence of a removal order being issued in absentia. In contrast, an alien who fails to show up at an immigration court proceeding specified in an NTA is ordered removed in absentia.

92. According to August 6, 2021, ICE figures, from March 21, 2021, to July 30, 2021, CBP released 65,531 aliens with an NTR after those aliens arrived illegally at the southern border. Of those, only 8,582 had reported to an ICE office for the issuance of a charging document (the NTA). That is a compliance rate of only 13 percent.

93. In FY2019, by utilizing contracts with other detention facilities, ICE was able to increase its detention capacity to more than 56,000 aliens, and the average daily detained population was 50,165. *See* U.S. Immigration and Customs Enforcement, *ERO FY 2019 Achievements*, available at https://www.ice.gov/features/ERO-2019. That is more than double the current detained population. Since January 20, 2021, ICE has significantly reduced its use of contracts to acquire additional detention capacity. If complying with federal law required Defendants to once again utilize that additional detention capacity, they could do so.

FEDERAL STATUTORY BACKGROUND

94. In 1996, Congress sought to reduce executive discretion significantly in the enforcement of federal

immigration laws: "[I]mmigration law enforcement is as high a priority as other aspects of Federal law enforcement, and illegal aliens do not have the right to remain in the United States undetected and unapprehended." H.R. Rep. No. 104-725 (1996), at 383.

95. In several statutory sections, Congress eliminated the discretion that existed previously regarding the detention and/or removal of certain aliens, and replaced the discretionary regime with a mandatory regime.

96. Enacted in 1996, 8 U.S.C. § 1225(a)(1) provides that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission."

97. 8 U.S.C. § 1225(a)(3) provides that all applicants for admission "shall be inspected by immigration officers."

98. 8 U.S.C. § 1225(b)(2)(A) mandates that "if the examining immigration officer determines that an alien seeking admission is not *clearly and beyond a doubt* entitled to be admitted, the alien *shall* be detained for of this title." (emphasis added). Proceedings under 8 U.S.C. § 1229a are regular removal proceedings before an immigration judge.

99. A parallel section at 8 U.S.C. § 1225(b)(1) applies to aliens arriving in the United States who either lack entry documents or attempt to gain admission through misrepresentation, and who are therefore subject to expedited removal. The language of this section is also mandatory: "the officer *shall* order the alien removed from the United States without

further hearing or review" unless the alien seeks asylum or asserts a fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added).

100. The Northern District of Texas has interpreted 8 U.S.C. § 1225(b)(2)(A) as imposing a *mandatory obligation* upon ICE to detain and initiate removal proceedings against aliens encountered by ICE officers: "The Court finds that Congress's use of the word 'shall' in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not 'clearly and beyond a doubt entitled to be admitted.' *Crane v. Napolitano*, Case No. 3:12-cv-03247-O (N.D. Tex. April 23, 2013), slip op. at 15.

101. The mandatory obligation imposed by 8 U.S.C. § 1225(b)(2)(A) leaves no room for the discretion by immigration officers described in the February 18 and September 30 Memoranda or the preapproval process created by the February 18 Memorandum.

102. The mandatory obligations of 8 U.S.C. § 1225(b)(2)(A) and 8 U.S.C. § 1225(b)(1)(A) apply to "immigration officers," a term that encompasses both ICE and CBP officers.

103. The February 18 Memorandum and the September 30 Memorandum violate the mandatory commands of 8 U.S.C. § 1225(b)(1)(A) and (2)(A) by making the detention and removal of illegal aliens encountered by ICE officers discretionary in some cases, and impermissible in others unless preapproval is granted by an ICE FOD or SAC.

104. The CBP policy of issuing NTRs instead of NTAs to aliens apprehended at the border violates the mandatory command of 8 U.S.C. § 1225(b)(2)(A), by failing to initiate a "a [removal] proceeding under section 1229a."

105. The CBP policy of failing to detain illegal aliens apprehended at the southern border who are not expeditiously removed under 8 U.S.C. § 1225(b)(1)(A) or directed to remain in Mexico under 8 U.S.C. § 1225(b)(2)(C) violates the mandatory command that such arriving aliens be detained pending removal. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii) (If it is determined that an alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum."); 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); 1225(b)(2)(A) ("[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.").

106. A second federal statute that has been violated through the implementation of the February 18 and September 30 Memoranda is 8 U.S.C. § 1226(c), which makes the detention of certain aliens mandatory, pending adjudication of their removal proceedings and ultimately their removal from the United States.

107. The categories of aliens whom DHS "shall take into custody" under 8 U.S.C. § 1226(c) include those who have committed an offense covered in 8

U.S.C. § 1182(a)(2), which includes "any alien convicted of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." 8 U.S.C. § 1182(a)(2)(A)(i)(II). 8 U.S.C. § 1226(c)(1)(C) also requires the detention of aliens convicted of crimes of moral turpitude (referring to 8 U.S.C. § 1227(a)(2)(A)(i)). 8 U.S.C. § 1226(c) also mandates the detention of aliens convicted of certain firearms offenses.

108. Aliens in the mandatory detention categories listed above fall outside of the priority enforcement categories of the February 18 Memorandum and therefore can *only* be detained by an ICE officer if preapproval from a FOD or SAC is obtained. This violates the mandatory detention requirement of 8 U.S.C. § 1226(c), which leaves no room for discretion.

109. The mandatory detention obligation of 8 U.S.C. § 1226(c) applies to both ICE and CBP officers.

110. The February 18 Memorandum violates 8 U.S.C. § 1226(c) by making discretionary the detention of relevant aliens who fall outside of the priority enforcement categories. The mandatory obligation imposed by 8 U.S.C. § 1226(c) leaves no room for discretion by immigration officers or the preapproval process created by the February 18 Memorandum.

111. The September 30 Memorandum compounds this violation of 8 U.S.C. § 1226(c) by making the detention of aliens who fall inside the priority enforcement categories discretionary as well. The mandatory obligation imposed by 8 U.S.C. § 1226(c)

leaves no room for discretion by immigration officers.

112. The September 30 Memorandum also violates 8 U.S.C. § 1226(c) by unequivocally stating, "[o]ur personnel should not rely on the fact of conviction or the result of a database search alone" in deciding whether to detain or remove an illegal alien. September 30 Memorandum, at 4. However, 8 U.S.C. § 1226(c) makes the detention of certain aliens mandatory, based solely on the fact that a qualifying conviction has occurred.

113. A third statute that has been violated through the implementation of the February 18 Memorandum is 8 U.S.C. § 1231(a), which makes the removal of certain aliens mandatory. 8 U.S.C. § 1231(a)(1)(A) requires the removal of any alien who is subject to a final order of removal. The executive branch "shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(5) requires the removal of an alien who has reentered the United States illegally after having been removed: "[T]he alien shall be removed under the prior order at any time after the reentry."

114. The February 18 Memorandum violates 8 U.S.C. § 1231(a) by applying the preapproval process to "deciding when and under what circumstances to execute final orders of removal." February 18 Memorandum at 3. This makes discretionary the removal of aliens subject to a final order of removal who fall outside of the priority enforcement categories. The mandatory obligation imposed by 8 U.S.C. § 1231(a) leaves no room for discretion by immigration officers or the preapproval process created by the

February 18 Memorandum.

115. The September 30 Memorandum continues a preapproval process whereby ICE and CBP personnel must justify enforcement with "compelling facts that warrant enforcement action," September 30 Memorandum, at 4; and it compounds the violation of 8 U.S.C. § 1231(a) by making the removal of aliens inside the priority removal categories subject to discretion as well. The September 30 Memorandum also violates 8 U.S.C. § 1231(a) by directing immigration officers to apply the following unlawful standard: "The fact that an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them." September 30 Memorandum, at 2.

116. The February 18 Memorandum and the September 30 Memorandum thus transform a mandatory removal requirement under federal law into a discretionary policy as it pertains to the removal of aliens subject to a final order of removal.

IRREPARABLE INJURY CAUSED BY DEFENDANTS' ACTIONS

117. Defendants' failure to detain and/or remove illegal aliens as required by federal law significantly injures the Plaintiff sheriffs and counties.

118. Detaining illegal alien criminals imposes significant costs upon the Plaintiff sheriffs and counties. These costs include the financial cost of detention and the consumption of scarce county law enforcement resources.

119. Those detention costs have already increased substantially since the implementation of the January 20 and February 18 Memoranda and will continue to remain elevated under the September 30 Memorandum as a result of Defendants' failure to detain and/or remove illegal aliens, particularly those involved in criminal activity, because it increases the number of criminal illegal aliens that Plaintiff sheriffs and counties must detain.

120. The cost of detaining additional individuals is significant, ranging from $48.00 to $80.00 per inmate, per day.

121. In Kinney County, there has been a dramatic increase in the number of crimes committed by illegal aliens following the implementation of the January 20 and February 18 Memoranda. From February to the beginning of July in 2021, the County apprehended more than 420 illegal aliens for the commission of various crimes. This compares to 180 illegal aliens apprehended during all of 2020.

122. As a result of this surge in illegal immigration and crimes by illegal aliens, since February 18, 2021, the Kinney County jail, which can hold 14 inmates, has been full or near full. In addition, the Kinney County sheriff's office will have between 10-12 inmates detained in other counties' facilities at a cost of $70.00 per person, per day.

123. As of July 1, 2021, the cost of detentions to Kinney County was already $75,000 greater than in was in all of 2020.

124. The increase in Kinney County detention

costs is principally attributable to Defendants' three Memoranda, due to (1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE is no longer taking custody of illegal aliens who have committed crimes in the county, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the county encouraged by Defendants' shutdown of immigration enforcement.

125. In Edwards County, there has been a significant increase in the number of crimes committed by illegal aliens following the implementation of the January 20 and February 18 Memoranda. During the February-July period of 2021, there were 62 percent more criminals booked into the Edwards County Jail than during the same period in 2020.

126. After February 2021, the population of inmates in the Edwards County jail doubled, from 9 or fewer, to 18-21. The vast majority of detainees arrested by the Edwards County Sheriff's Office since February 2021 have been either illegal aliens, or persons involved in criminal activity relating to illegal immigration.

127. During the February-July 2021 period, the cost of the additional detentions to Edwards County, over and above the normal detention costs, was over $91,000.

128. The increase in Edwards County detention costs is principally attributable to Defendants' three Memoranda, due to (1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE

is no longer taking custody of illegal aliens who have committed crimes in the county, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the county encouraged by Defendants' shutdown of immigration enforcement.

129. In McMullen County, there has been a significant increase in the number of crimes committed by illegal aliens following the implementation of the January 20 and February 18 Memoranda. During the period of February-July 2020, 54 people were arrested for criminal activities. During the period of February-July 2021, 451 people were arrested for criminal activities. The number of criminal arrests in 2021 is therefore more than eight times what it was during the same period in 2020.

130. As a result of the sharp increase in crime caused by illegal aliens and those smuggling illegal aliens, McMullen County's criminal detention costs have risen, from $52,870 during February-July 2020 to $85,024 during February-July 2021. That is an increase of $32,154.

131. The increase in McMullen County detention costs is principally attributable to Defendants' three Memoranda, due to (1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE is no longer taking custody of illegal aliens who have committed crimes in the county, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the county encouraged by Defendants' shutdown of immigration enforcement.

132. In Galveston County, there has been an increase in the number of crimes committed by illegal aliens following the implementation of the January 20 and February 18 Memoranda. During the February-July period of 2021, there were 30 percent more criminals booked into the Galveston County Jail than during the same period in 2020.

133. It costs Galveston County $69.43 per person, per day, to detain an inmate in its jail. Galveston County detention costs rose accordingly, during the February-July 2021 period.

134. The increase in Galveston County detention costs is attributable in part to Defendants' three Memoranda, due to (1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE is no longer taking custody of illegal aliens who have committed crimes in the county, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the county encouraged by Defendants' shutdown of immigration enforcement.

135. In Hudspeth County, there has been a significant increase in the number of crimes committed by illegal aliens following the implementation of the January 20 and February 18 Memoranda.

136. There has been an attendant increase in the number of criminals detained by Hudspeth County and in in the detention costs borne by the County since the implementation of the January 20 and February 18 Memoranda.

137. The increase in Hudspeth County detention

costs is principally attributable to Defendants' three Memoranda, due to (1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE is no longer taking custody of illegal aliens who have committed crimes in the county, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the county encouraged by Defendants' shutdown of immigration enforcement.

138. In Live Oak County, there has been a significant increase in the number of crimes committed by illegal aliens following the implementation of the January 20 and February 18 Memoranda.

139. There has been an attendant increase in the number of criminals detained by Live Oak County and in in the detention costs borne by the County since the implementation of the January 20 and February 18 Memoranda.

140. The increase in Live Oak County detention costs is principally attributable to Defendants' three Memoranda, due to (1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE is no longer taking custody of illegal aliens who have committed crimes in the county, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the county encouraged by Defendants' shutdown of immigration enforcement.

141. In Real County, there has been a significant increase in the number of crimes committed by illegal aliens following the implementation of the January 20

and February 18 Memoranda.

142. There has been an attendant increase in the number of criminals detained by Real County and in in the detention costs borne by the County since the implementation of the January 20 and February 18 Memoranda.

143. The increase in Real County detention costs is principally attributable to Defendants' three Memoranda, due to (1) recidivism by illegal alien criminals who have been released, (2) the fact that ICE is no longer taking custody of illegal aliens who have committed crimes in the county, (3) the related fact that the average period of county detention for illegal alien criminals is now longer, and (4) the entry of new illegal alien criminals into the county encouraged by Defendants' shutdown of immigration enforcement.

144. The sudden nature of the shift in Defendant's policies exacerbates the harm to all seven Plaintiff counties.

145. In addition, the release of criminal aliens into all seven Plaintiff counties imposes significant costs on Plaintiff sheriffs and their respective offices. Those costs include the effects of the crimes they commit while free, the costs of investigating those crimes, the costs of monitoring or supervising criminal aliens, and the costs of arresting and detaining those same aliens a subsequent time or times.

146. In addition, the January 20 and February 18 Memoranda and the actions of Defendants have caused a surge in illegal immigration and massive increase in crime in all seven Plaintiff counties. This surge

includes thousands of additional illegal aliens beyond the specific aliens that Defendants encountered, but failed to detain or remove. Plaintiffs bear the financial costs of investigation, arrest, and detention caused by that increase in crime.

147. In addition, the surge in illegal immigration and related crime caused by the actions of Defendants has diverted all seven Plaintiff counties' scarce law enforcement resources. Sheriff's deputies are not able to attend to their normal patrol and other public safety duties because the crime associated with the surge in illegal immigration has consumed their attention and time.

148. Finally, Defendants' failure to take custody of, or remove, illegal aliens whose detention and/or removal is required by federal law has led to demands on Plaintiff's jail facilities beyond their capacity. As a result, Plaintiff sheriffs are left with no alternative but to release such criminal aliens into the public when, prior to the February 18 Memorandum, ICE would have taken custody of such aliens and removed them, as required by federal law.

149. This release of illegal aliens and consequent endangering of the public effectively forces Plaintiff sheriffs to violate their oaths of office to preserve, protect, and defend the Constitution and laws of the United States and of Texas. In particular, Plaintiff sheriffs are concerned that they are compelled to release illegal aliens whose detention and removal is mandated by federal law.

150. Plaintiff Federal Police Foundation, ICE

Officers Division, has been compelled to expend resources that it otherwise would not have expended informing its members of the February 18 Memorandum and the ways in which it violates federal law. The Foundation has had to divert resources to advising members of their legal options and employment consequences when those members face the dilemma of following federal law versus following the unlawful February 18 Memorandum. The Plaintiff Federal Police Foundation, ICE Officers Division, has also been forced to provide information to its members regarding the consequences and results of the complicated preapproval process created by the February 18 Memorandum.

151. As a result of Defendants' actions, the Federal Police Foundation has had to divert its limited resources to deal with the consequences of Defendants' radical change in immigration enforcement practices. Addressing the February 18 and September 30 Memoranda and their consequences has consumed more than 50 percent of the Foundation's man-hours of activity.

152. Addressing the February 18 and September 30 Memoranda and their consequences has also caused the Federal Police Foundation to spend an additional $1,017.48 per year to provide rapid updates to its members on the implementation of the Memoranda, consequent changes in agency protocols, and litigation regarding the Memoranda.

153. Members of Plaintiff Federal Police Foundation, ICE Officers Division, are forced by the February 18 and September 30 Memoranda to choose

between following the dictates of the Memorandum and following federal laws that clearly require them to detain and/or remove certain illegal aliens. Plaintiffs fear that they will be disciplined or will lose their jobs if they follow the law.

154. Members of Plaintiff Federal Police Foundation, ICE Officers Division, are compelled by the February 18 and September 30 Memoranda to effectively violate their oaths of office because it forces them to knowingly violate federal law or face discipline.

FIRST CAUSE OF ACTION
THE MEMORANDA VIOLATE 8 U.S.C. § 1225(b)(2)(A) WHICH REQUIRES THE DETENTION AND INITIATION OF REMOVAL OF ILLEGAL ALIENS ENCOUNTERED BY IMMIGRATION OFFICERS

155. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

156. 8 U.S.C. § 1225(a)(1) requires that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." This designation triggers 8 U.S.C. § 1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers 8 U.S.C. § 1225(b)(2)(A), which mandates that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." The

proceedings under 8 U.S.C. § 1229a are removal proceedings in United States immigration courts.

157. The February 18 and September 30 Memoranda violate the above-listed provisions of federal law by making discretionary the detention of certain aliens, when federal law clearly mandates that Defendants detain such aliens in order to place them into removal proceedings.

158. The February 18 and September 30 Memoranda violate the above-listed provisions of federal law by making discretionary the placement of certain aliens into removal proceedings, when federal law clearly mandates that Defendants place such aliens into removal proceedings.

159. The September 30 Memorandum's statement that, "[t]he fact an individual is a removable noncitizen … should not alone be the basis of an enforcement action against them" clearly violates the command of 8 U.S.C. § 1225(b)(2)(A), which mandates the detention and initiation of removal proceedings against every inadmissible alien encountered by CBP and ICE officers.

160. Because Congress has by statute expressly limited the discretion of Defendants to not detain and initiate removal proceedings, any "prosecutorial discretion" that Defendants exercise must be consistent with 8 U.S.C. § 1225(b)(2)(A) and can only occur after an alien has been placed into removal proceedings as required by 8 U.S.C. § 1225(b)(2)(A), or under a provision of federal law expressly authorizing such "prosecutorial discretion."

161. The CBP policy of issuing NTRs instead of NTAs to aliens apprehended at the border violates the mandatory command of 8 U.S.C. § 1225(b)(2)(A), by causing Border Patrol officers to decline to initiate a "a [removal] proceeding under section 1229a."

162. The CBP policy of failing to detain illegal aliens apprehended at the southern border who are not expeditiously removed under 8 U.S.C. § 1225(b)(1) or directed to remain in Mexico under 8 U.S.C. § 1225(b)(2)(C) violates the mandatory command that such aliens be detained. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii) (If it is determined that an alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum."); 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); 1225(b)(2)(A) ("[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.").

163. The February 18 and September 30 Memoranda attempt to replace the mandatory system imposed by Congress in 8 U.S.C. § 1225(b)(2)(A) with a discretionary system created by executive decree.

164. Defendant Mayorkas's authority under 8 U.S.C. § 1103(a)(5) and 8 C.F.R. § 2.1 does not authorize him to order his subordinate officers or employees to violate the requirements of federal law set forth in 8 U.S.C. § 1225(b)(2)(A).

165. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

SECOND CAUSE OF ACTION
THE MEMORANDA VIOLATE 8 U.S.C. § 1226(c), WHICH MAKES THE DETENTION OF CERTAIN ILLEGAL ALIENS MANDATORY

166. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

167. 8 U.S.C. § 1226(c) makes the detention of certain aliens mandatory. The categories of aliens whom DHS "shall take into custody" include "any alien convicted of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." 8 U.S.C. § 1182(a)(2)(A)(i)(II), any alien convicted of a crime of moral turpitude, and any alien convicted of certain firearms offenses.

168. A mandatory duty to detain an alien that is expressly spelled out in federal law cannot be modified by a discretionary enforcement policy that requires immigration officers to seek preapproval before taking any enforcement action, or that requires immigration officers to weigh certain factors in order to decide whether or not to detain the alien.

169. The February 18 Memorandum violates 8 U.S.C. § 1226(c) on its face, by making discretionary and difficult the detention of aliens who have been convicted of relevant crimes, but who fall outside of the priority enforcement categories.

170. The September 30 Memorandum also violates 8 U.S.C. § 1226(c) on its face, by making discretionary the detention of aliens who have been convicted of relevant crimes and by forcing immigration officers to weigh aggravating and mitigating factors to make a discretionary determination of whether or not to detain such an alien, whereas 8 U.S.C. § 1226(c) makes the detention of the alien mandatory. In fact, the September 30 Memorandum prohibits officers from relying solely on the fact that an illegal alien has been convicted of a qualifying crime: "Our personnel should not rely on the fact of conviction or the result of a database search alone." September 30 Memorandum, at 4.

171. The February 18 and September 30 Memoranda attempt to replace the mandatory system imposed by Congress in 8 U.S.C. § 1226(c) with a discretionary system created by executive decree.

172. Defendant Mayorkas's authority under 8 U.S.C. § 1103(a)(5) and 8 C.F.R. § 2.1 does not authorize him to order his subordinate officers or employees to violate the requirements of federal law set forth in 8 U.S.C. § 1226(c).

173. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

THIRD CAUSE OF ACTION
THE MEMORANDA VIOLATE 8 U.S.C. § 1231(a), WHICH MAKES THE REMOVAL OF CERTAIN ILLEGAL ALIENS MANDATORY

174. Plaintiffs reallege, adopt, and incorporate by

reference all preceding paragraphs as though fully set forth herein.

175. 8 U.S.C. § 1231(a) makes the removal of certain illegal aliens mandatory.

176. Specifically, 8 U.S.C. § 1231(a)(5) mandates the removal of an alien who has reentered the United States illegally after having been removed: "[T]he alien *shall* be removed under the prior order at any time after the reentry." *Id*. (emphasis added).

177. The February 18 Memorandum violates 8 U.S.C. § 1231(a) on its face, by making discretionary the removal of aliens subject to a final order of removal who fall outside of the priority enforcement categories. Doing so subverts a mandatory removal requirement found in federal statute and transforms it into a discretionary policy.

178. The September 30 Memorandum violates 8 U.S.C. § 1231(a) on its face, by making discretionary the removal of all aliens subject to a final order of removal. Doing so subverts a mandatory removal requirement found in federal statute and transforms it into a discretionary policy.

179. The February 18 and September 30 Memoranda attempt to replace the mandatory system imposed by Congress in 8 U.S.C. § 1231(a) with a discretionary system created by executive decree.

180. Defendant Mayorkas's authority under 8 USC § 1103(a)(5) and 8 CFR § 2.1 does not authorize him to order his subordinate officers or employees to violate the requirements of federal law set forth in 8

U.S.C. § 1231(a).

181. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

FOURTH CAUSE OF ACTION THE MEMORANDA VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

182. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

183. The February 18 and September 30 Memoranda, together, constitute a final agency action that is reviewable under the APA: (1) the Memoranda consummate Defendants' policy decision; and (2) legal consequences flow from the decision because it changes the statutory obligations of ICE officers.

184. As explained above, the February 18 and September 30 Memoranda violate three different federal statutes. Plaintiffs accordingly ask this Court to "hold unlawful and set aside agency action" which is "not in accordance with law." 5 U.S.C. § 706(2)(A).

185. The February 18 and September 30 Memoranda also violate the specific procedural requirements of the APA, described below.

186. First, the APA requires that agencies implementing congressional statutes in whole or in part through an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy do so through a

rulemaking. A rulemaking under the APA is defined as the agency process for formulating, amending, or repealing a rule through notice and comment procedures under the APA, 5 U.S.C. § 553. The INA delegates authority to the Secretary of Homeland Security and the Attorney General to implement its provisions through regulations. The Secretary has not promulgated any regulation that establishes the criteria or processes of the February 18 Memorandum or the September 30 Memorandum.

187. The September 30 Memorandum states categorically: "The fact an individual is a removable noncitizen … should not alone be the basis of an enforcement action against them." September 30 Memorandum, at 2. This is a substantive rule under the APA that binds immigration officers and is procedurally invalid because it was promulgated without the required notice and comment.

188. The September 30 Memorandum also states unconditionally that the fact that an alien has been convicted of any crime is insufficient to trigger an enforcement action: "Our personnel should not rely on the fact of conviction or the result of a database search alone." *Id*. at 2. This is a substantive rule under the APA that binds immigration officers and is procedurally invalid because it was promulgated without the required notice and comment.

189. Establishing classes of aliens who cannot be detained or removed except through a preapproval process is a rule under the APA, 5 U.S.C. § 551(4). The Secretary has not issued a notice of proposed rulemaking or promulgated a final rule implementing

this policy in conformity with the APA.

190. Defendant Mayorkas's authority under 8 U.S.C. § 1103(a)(5) and 8 C.F.R. § 2.1 does not include the authority to circumvent the terms of the Administrative Procedure Act by simply issuing a "Memorandum" that significantly transforms the enforcement of federal immigration law.

191. The February 18 and September 30 Memoranda should be held "unlawful and set aside" because they were promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

192. The February 18 and September 30 Memoranda violate the APA in a second respect because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C).

193. The February 18 and September 30 Memoranda represent a sharp and significant departure from previous policy governing detainers, detention, and removal. Because Defendants do not sufficiently explain that sudden departure, the Memoranda are arbitrary and capricious.

194. The February 18 and September 30 Memoranda do not represent reasoned decision making.

195. DHS and ICE ignored the harms that failing to detain and remove illegal aliens will cause. Neither the February 18 Memorandum nor the September 30 Memorandum analyzed the costs that predictably fall

on local law enforcement entities such as Plaintiff sheriffs and counties. Failing to consider important costs of a new policy renders that policy arbitrary and capricious.

196. The February 18 and September 30 Memoranda also failed to consider alternative approaches that would have allowed a greater number of detentions and removals to occur, which would have offered greater protection to the public, caused less financial injury to Plaintiffs, and would have caused less of an influx of additional illegal immigration.

197. Even if the Defendants had considered the harms caused by, and alternative approaches to, the February 18 and September 30 Memoranda, they did not explain or justify the grounds on which the Defendant agency proceeded to issue the Memoranda.

198. Defendant Mayorkas's authority under 8 U.S.C. § 1103(a)(5) and 8 C.F.R. § 2.1 does not authorize him to circumvent the terms of the Administrative Procedure Act by simply issuing a "Memorandum" that significantly transforms the enforcement of federal immigration law.

199. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

FIFTH CAUSE OF ACTION
THE MEMORANDA VIOLATE THE ARTICLE II, SECTION 3, CONSTITUTIONAL OBLIGATION OF THE EXECUTIVE TO TAKE CARE THAT THE LAWS ARE FAITHFULLY EXECUTED

200. Plaintiffs reallege, adopt, and incorporate by reference all preceding paragraphs as though fully set forth herein.

201. Article II, section 3, of the United States Constitution requires that the President, by and through his executive branch officials, including Defendants, "shall take Care that the Laws be faithfully executed."

202. The February 18 and September 30 Memoranda are unconstitutional because they direct executive officials not to faithfully execute federal law, and not to comply with federal statutes that impose *mandatory* obligations upon immigration officers.

203. Unconstitutional agency action or inaction violates the APA. *See* 5 U.S.C. § 706.

204. Defendant Mayorkas's authority under 8 U.S.C. § 1103(a)(5) and 8 C.F.R. § 2.1 does not include the authority to order his subordinate officers or employees to decline to comply with federal statutes that impose mandatory obligations upon them.

205. Constitutional violations are actionable independently of the APA. Federal courts possess the power to enjoin federal officers from violating the Constitution.

206. Plaintiffs seek a declaratory judgment to these effects, together with corresponding injunctive relief.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

A. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(B) that the January 20, February 18, and September 30 Memoranda are unlawful and in violation of 8 U.S.C. § 1225(b)(2), 8 U.S.C. § 1226(c), and 8 U.S.C. § 1231(a) and vacate the Memoranda.

B. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(D) that the January 20, February 18, and September 30 Memoranda are unlawful and in violation of the Administrative Procedure Act as a rule promulgated without conforming to the procedures described therein and vacate the Memoranda;

C. Declare pursuant to 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. § 706(2)(B) that the January 20, February 18, and September 30 Memoranda are in violation of Article II of the Constitution of the United States, as in excess of executive authority and in contravention of the executive's duty to take care that the laws be faithfully executed, and vacate the Memoranda;

D. Preliminarily enjoin and permanently enjoin Defendants and their subordinate officers, employees, and agents from implementing or enforcing the January 20, February 18, and September 30 Memoranda;

E. Preliminarily enjoin and permanently enjoin Defendants and their subordinate officers, employees, and agents to fully comply with their statutory obligations to take enforcement actions against certain aliens, including taking custody of, detaining, and removing illegal aliens as mandated by 8 U.S.C.

§ 1225(b)(2)(A), 8 U.S.C. § 1226(c), and 8 U.S.C. § 1231(a).

F. Preliminarily enjoin and permanently enjoin Defendants and subordinate officers, employees, and agents to take custody of all criminal illegal aliens whose detention is required by law and who are presented to them by local or state law enforcement agencies pursuant to a "287(g) agreement," under 8 U.S.C. § 1357(g).

G. Preliminarily enjoin and permanently enjoin Defendants and subordinate officers, employees, and agents to reinstate all detainers that were lifted pursuant to the January 20 Memorandum or the February 18 Memorandum, where the detention of such alien is required by 8 U.S.C. § 1225(b)(2), 8 U.S.C. § 1226(c), or 8 U.S.C. § 1231(a).

H. Preliminarily enjoin and permanently enjoin Defendants and subordinate officers, employees, and agents to take custody of all illegal aliens whose detention or removal is required by 8 U.S.C. § 1225(b)(2), 8 U.S.C. § 1226(c), or 8 U.S.C. § 1231(a), and who have been arrested by local law enforcement agencies for the commission of state crimes, when such local law enforcement agencies seek to transfer custody of such aliens to ICE.

I. Preliminarily enjoin and permanently enjoin CBP Defendants and subordinate officers, employees, and agents to cease issuing to illegal aliens NTRs and instead comply with their statutory obligation to issue NTAs to illegal aliens who are not immediately removed from the country through expedited removal.

J. Preliminarily enjoin and permanently enjoin CBP Defendants and subordinate officers, employees, and agents to comply with 8 U.S.C. § 1225(b) and detain illegal aliens apprehended at the southern border who are not expeditiously removed under 8 U.S.C. § 1225(b)(1) or directed to remain in Mexico under 8 U.S.C. § 1225(b)(2)(C).

K. Direct Defendants to pay all costs associated with this lawsuit; and

L. Grant such other and further relief as this Court deems equitable, just, and proper.

Dated October 8, 2001

By: s/ Kris W. Kobach
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that this Motion for Leave to File Affidavit Under Seal was filed electronically and served on Defendants via the Court's CM/ECF system on this 8th day of October, 2021.

/s Kris W. Kobach
KRIS W. KOBACH

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

Civil Action No. 3:21-CV-00168

[Dated: July 8, 2021]

SHERIFF BRAD COE in his official capacity and KINNEY COUNTY, TEXAS; SHERIFF J.W. GUTHRIE in his official capacity and EDWARDS COUNTY, TEXAS; SHERIFF EMMETT SHELTON in his official capacity and MCMULLEN COUNTY, TEXAS; SHERIFF ARVIN WEST in his official capacity and HUDSPETH COUNTY, TEXAS; THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION,	)
Plaintiffs,	)
v.	)
JOSEPH R. BIDEN, JR., President, in his official capacity; THE UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official	)

Capacity; IMMIGRATION AND CUSTOMS ENFORCEMENT; TROY MILLER, Senior Official Performing the Duties of Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION,

Defendants.

AFFIDAVIT OF BRAD COE

I, Brad Coe, hereby declare:

I make the statements in this Affidavit based on my own personal knowledge, being duly sworn on oath, and if called to testify, I could and would do so competently as follows:

1. I am Brad Coe, a plaintiff in the above-captioned case.

2. I am the elected sheriff of Kinney County, Texas. I have served in that capacity since January 1, 2017.

3. Prior to my service as sheriff, I was a Border Patrol officer for 30 years, from January 20, 1985, to December 31, 2015.

4. As sheriff, I oversee the Kinney County Jail, which can house 14 inmates. It costs my office $70.00 per person, per day to detain someone in our jail. When our jail space is full, I contract with Val Verde and Burnet counties to house our inmates, at a cost of $70.00 per person, per day.

5. Prior to February 18, 2021, my office had an excellent, cooperative relationship with Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). It was routine and it was expected that if my deputies had arrested an illegal alien for the commission of a crime, and the alien was no longer being detained by the county, ICE or CBP would take custody of the alien and remove him from the United States.

6. Prior to February 18, 2021, it was also routine and it was expected that if a criminal alien had finished serving his sentence for a crime, ICE or CBP would take custody of that alien and remove him from the United States if my office notified them that his sentence was ending.

7. Since February 2021, there has been a massive increase in illegal immigration through Kinney County and in the number of crimes committed by illegal aliens in Kinney County. In the year 2020, Kinney County apprehended a total of 180 illegal aliens, with current apprehensions thus far in 2021 already exceeding 420. In the year 2020, Kinney County apprehended a total of 47 individuals attempting to smuggle illegal aliens, with current apprehensions thus far in 2021 already exceeding 72. The increased level of illegal alien criminal activity this year has resulted in 12 house burglaries and 2 assaults on citizens of Kinney County.

8. The law enforcement burden of this increase of illegal alien criminal activity has also required an additional approximately 4,000 hours of county law enforcement in pursuits, booking, patrols, etc. The towing fees alone for the vehicles involved in illegal

alien smuggling has cost Kinney County law enforcement over $16,000. The increase of illegal alien criminal activity and limited jail space capacity of the Kinney County jail has resulted in approximately 85 criminals being turned away after an arrest.

9. As a result of this surge in illegal immigration and in the crimes committed by illegal aliens, after February 18, 2021, the Kinney County jail has been full or near-full. At any given time, my office will also have between 10-12 inmates in the other jails that I contract with.

10. The overwhelming majority of detainees that my office has arrested are either illegal aliens or involved in activity relating to illegal immigration.

11. The cost of these extra detentions to Kinney County has been significant. The amount of money spent on detention of inmates since February of 2021, as of July 1, is already $75,000 greater than it was in all of 2020.

12. If the current elevated amount of illegal immigration and associated crime continues, I expect that my office will be required to spend an additional $300,000, over and above our normal budget, in 2022. Those additional costs will come in the form of detention expenses, medical expenses, supplies cost, transportation costs and overtime.

13. My deputies have called ICE multiple times to ask ICE to take custody of illegal aliens who have committed crimes. I CE has refused to take custody of such aliens since February 18, 2021. More specifically, ICE has refused to take custody or initiate removal

proceedings for any illegal alien convicted of criminal trespass.

14. I am not aware of a single occasion since February 18, 2021, when ICE has agreed to take custody of an illegal alien when requested by my office.

15. ICE has notified my office that illegal aliens convicted of criminal trespass would not be accepted for removal proceedings because they no longer meet the criteria for removal under the new policies.

16. In addition to the Kinney County Jail, another detention facility in Kinney County is the Kinney County Detention Center, which can hold 420 inmates. It is operated by Kinney County, but it is used to detain prisoners for the U.S. Marshal's Office of the federal government. Currently, said Detention Center contains 171 immigration detainers. If the unlawful policies of the February 18th memorandum are allowed to continue, the majority of those 171 illegal aliens will be released back into the community and place county residents in harm's way.

17. Recently, on approximately May 1, 2021, an illegal alien who as in custody for the federal offense of violating 8 U.S.C. § 1326 (reentry of a removed alien), and had a detainer placed on him by ICE prior to February 18, 2021, was about to be released. My deputy called ICE to notify them that the alien was about to be released and to request that they take custody. Instead of picking up and removing the aliens, as previously was the practice, ICE stated that they were no longer interested in executing the detainer or taking custody of the criminal alien. My deputy then

called CBP to see if they would take custody of the alien to remove him, and they refused to take the alien as well.

18. Because ICE and CBP are no longer taking custody of illegal aliens who have already been arrested or convicted of at least one crime, those aliens are committing additional crimes in Kinney and neighboring counties after their release. Due to illegal aliens not being subject to removal proceedings for convictions of criminal trespass, their continued presence in the community has caused an elevated level of criminal activity that my office has had to contend with.

19. The surge in illegal alien crime after February 18, 202 1, has greatly endangered the public in Kinney County. The crimes committed by illegal aliens include criminal trespass, assault, burglary, evading arrest, child endangerment and theft.

20. The surge in illegal alien crime after February 18, 2021, has also diverted my deputies from their normal law enforcement duties, such as responding to burglaries or medical emergencies of county residents.

21. When I took my oath of office, I swore that "I would protect the people of Kinney County". ICE's policy of not taking custody of most illegal alien criminals since February 18, 2021, has made it difficult for me to keep this oath; because of limited resources my office cannot cope with the dramatic increase of illegal alien criminal activity.

22. I have personal knowledge concerning the information contained in this Affidavit.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Brad Coe
Brad Coe

SUBSCRIBED AND SWORN TO before me this 8 day of July, 2021.

[SEAL] /s/ Cynthia Gose
Notary Public

APPENDIX C

[Dated: October 24, 2022]

No. 22-58

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *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

DECLARATION OF BRAD COE

I, Brad Coe, hereby declare:

1. I reside in Kinney County, Texas, am a United States citizen more than 18 years of age, and am fully competent to testify in a federal court.

2. I am a plaintiff in *Coe v. Biden*, No. 3:21- cv-0168-JVB (S.D. Tex.), and a movant for intervention in the above-captioned case.

3. This declaration updates the affidavit I made in the *Coe* litigation on July 8, 2021, to include developments since that time. In general, and as the data below show, the law-enforcement situation from illegal immigration in Kinney County has worsened since July of 2021 as the challenged policies continue.

4. I am the elected Sheriff of Kinney County, Texas. I have served in that capacity since January 1, 2017.

5. Prior to my service as Sheriff, I was a Border Patrol officer for 30 years, from January 20, 1985, to December 31, 2015.

6. As Sheriff, I oversee the Kinney County Jail, which can house 14 inmates. It costs my office $70.00 per person, per day to detain someone in our jail. When our jail space is full, I contract with Val Verde and Burnet Counties to house our inmates, at a cost of $70.00 per person, per day.

7. Prior to February 18, 2021, my office had an excellent, cooperative relationship with Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). It was routine and it was expected that if my deputies had arrested an illegal alien for the commission of a crime, and the alien was no longer being detained by the County, ICE or CBP would take custody of the alien and remove him from the United States.

8. Prior to February 18, 2021, it was also routine and it was expected that if a criminal alien had finished serving his sentence for a crime, ICE or CBP would take custody of that alien and remove him from the United States if my office notified them that his sentence was ending.

9. Since February 2021, there has been a massive increase in illegal immigration through Kinney County and in the number of crimes committed by illegal aliens in Kinney County. In the year 2020, Kinney County apprehended a total of 180 illegal aliens. In the year

2021, Kinney County apprehended a total of 1121 illegal aliens, with current apprehensions thus far in 2022 already exceeding 2,468. In the year 2020, Kinney County apprehended a total of 47 individuals attempting to smuggle illegal aliens. In the year 2021, Kinney County apprehended a total of 188 individuals attempting to smuggle illegal aliens, with current apprehensions thus far in 2022 exceeding 534.

10. The law enforcement burden of this increase of illegal alien criminal activity has also required an additional approximately 4,000 hours of county law enforcement in pursuits, booking, patrols, etc. The towing fees alone for the vehicles involved in illegal alien smuggling has cost Kinney County law enforcement over $98,000. The increase of illegal alien criminal activity and limited jail space capacity of the Kinney County jail has resulted in approximately 154 criminals being turned away after an arrest.

11. As a result of this surge in illegal immigration and in the crimes committed by illegal aliens, after February 18, 2021, the Kinney County jail has been full or near full. At any given time, my office will also have between 10-12 inmates in the other jails that I contract with.

12. The overwhelming majority of detainees that my office has arrested are either illegal aliens or involved in activity relating to illegal immigration.

13. The immigration-related detention costs since February 2021 have created an unsustainable financial burden for Kinney County. At the time of my prior affidavit in the *Coe* litigation, the detention costs borne

by Kinney County for only a 6-month period already exceeded that of the previous year by $75,000. Kinney County's current expenditures for the detention of illegal aliens continues to reach unprecedented levels and is on pace to exceed that of the prior year. Through Operation Lonestar and other programs, the State of Texas reimburses some—but not all—law-enforcement and detention expenditures incurred by my office in fiscal year 2022 to deal with the continuing dramatic increases, over pre-February 2021 levels, of crimes committed by illegal aliens and smugglers. Such grants are capped and, for fiscal year 2022, these law-enforcement and detention expenditures were well over $50,000 greater than what the State of Texas has reimbursed or will reimburse the County for under these programs.

14. If the current elevated amount of illegal immigration and associated crime continues, I expect that my office will be required to spend more than our 2023 budget. Our budget for 2023 s $1,564,234 which is $508,408 more than our previous year's budget. The additional cost will come in the form of detention expenses, medical expenses, supplies cost, transportation costs and overtime associated with the surge in illegal immigration.

15. My deputies have called ICE multiple times to ask ICE to take custody of illegal aliens who have committed crimes. ICE has refused to take custody of such aliens since February 18, 2021. More specifically, ICE has refused to take custody or initiate removal proceedings for any illegal alien convicted of criminal trespass.

16. I am not aware of a single occasion since February 18, 2021, when ICE has agreed to take custody of an illegal alien when requested by my office.

17. ICE has notified my office that illegal aliens convicted of criminal trespass would not be accepted for removal proceedings because they no longer meet the criteria for removal under the new policies.

18. In addition to the Kinney County Jail, another detention facility in Kinney County is the Kinney County Detention Center, which can hold 420 inmates. It is operated by Kinney County, but it is used to detain prisoners for the U.S. Marshals Office of the Federal Government. Currently, said Detention Center contains 269 immigration detainers. If the unlawful policies challenged in the *Coe* litigation and in the above-captioned case are allowed to continue, the majority of those 269 illegal aliens will be released back into the community and place County residents in harm's way.

19. On or about May 1, 2021, an illegal alien who as in custody for the federal offense of violating 8 U.S.C. § 1326 (reentry of a removed alien), and had a detainer placed on him by ICE prior to February 18, 2021, was about to be released. My deputy called ICE to notify them that the alien was about to be released and to request that they take custody. Instead of picking up and removing the aliens, as previously was the practice, ICE stated that they were no longer interested in executing the detainer or taking custody of the criminal alien. My deputy then called CBP to see if they would take custody of the alien to remove him, and they refused to take the alien as well. Based on my

experience as Sherriff, these ICE and CBP policies continue to the present.

20. Because ICE and CBP are no longer taking custody of illegal aliens who have already been arrested or convicted of at least one crime, those aliens are committing additional crimes in Kinney and neighboring counties after their release. Due to illegal aliens not being subject to removal proceedings for convictions of criminal trespass, their continued presence in the community has caused an elevated level of criminal activity that my office has had to contend with.

21. The surge in illegal alien crime after February 18, 2021, has greatly endangered the public in Kinney County and has made the task of enforcing the law more dangerous. The crimes committed by illegal aliens include criminal trespass, assault, burglary, evading arrest, child endangerment and theft.

22. When I took my oath of office, I swore that I would protect the people of Kinney County. ICE's policy of not taking custody of most illegal alien criminals since February 18, 2021, has made it difficult for me to keep this oath; because of limited resources my office cannot cope with the dramatic increase of illegal alien criminal activity.

23. As a former Border Patrol officer, as Sherriff of Kinney County, and as a Texan living near our southern border, I want the officer defendants in the above-captioned action and in the *Coe* litigation to do the jobs that Congress has assigned to their offices by statute because their doing so would make the people

I have sworn to protect, as well as my deputies and me, safer.

24. I have personal knowledge concerning the information contained in this declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of October 2022 in Brackettville, Texas.

s/_____
Brad Coe
Sherriff,
Kinney County, Texas

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

Civil Action No. 3:21-CV-00168

[Dated: August 25, 2021]

SHERIFF BRAD COE in his official capacity and KINNEY COUNTY, TEXAS; SHERIFF J.W. GUTHRIE in official capacity and EDWARDS COUNTY, TEXAS; SHERIFF EMMETT SHELTON in his official capacity and MCMULLEN COUNTY, TEXAS; SHERIFF ARVIN WEST in his official capacity and HUDSPETH COUNTY, TEXAS; SHERIFF LARRY BUSBY in his official capacity and LIVE OAK COUNTY, TEXAS; THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., President, in his official capacity; THE UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; TAE JOHNSON,

Acting Director of U.S. Immigration and Customs Enforcement, in his official Capacity; IMMIGRATION AND CUSTOMS ENFORCEMENT; TROY MILLER, Senior Official Performing the Duties of Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION,	)
Defendants.	)

SUPPLEMENTAL AFFIDAVIT OF FEDERAL POLICE FOUNDATION

DIRECTOR
CHRISTOPHER L. CRANE

I, Christopher L. Crane, hereby declare:

I make the statements in this Affidavit based on my own personal knowledge and conversations with other ICE officers in the field, being duly sworn on oath, and if called to testify, I could and would do so competently as follows:

1. I am Christopher L. Crane, an Immigration and Customs Enforcement ("ICE") Deportation Officer and the Director of the Federal Police Foundation, which is a plaintiff in the above-captioned case.

2. I serve in Enforcement and Removal Operations at the Salt Lake City Field Office at 2975 Decker Lake Drive, Suite 100, in West Valley City, Utah.

3. I am familiar with the procedures and practices

generally of the ICE offices throughout the United States.

4. The Federal Police Foundation is a 501(c)(3) non-profit organization.

5. The Federal Police Foundation was founded in May 2019 for the purposes of, among other things, conducting research with respect to issues relating to federal law enforcement agencies and publishing the results of such research, educating the public about federal law enforcement officers and their duties, engaging in various causes to benefit federal law enforcement officers, and potentially participating in litigation in the public interest involving federal law enforcement.

6. As a relatively new organization, the Federal Police Foundation is still in a growth and development stage. As such, its resources are extremely limited at this time.

7. Acting Director of ICE Tae Johnson's issuance of a Memorandum to all ICE employees entitled "Interim Guidance: Civil Immigration Enforcement Removal and Priorities" on February 18, 2021 (the "February 18 Memorandum") radically disrupted and changed the practices of all ICE offices in the country and required ICE officers to violate federal law in several ways.

8. When the Biden Administration initiated its extreme and unprecedented changes to the nation's immigration system in the February 18 Memorandum, the Federal Police Foundation had to act, even though it was not completely stood up and financially able to do so, because the February 18 Memorandum was the

subject of great concern among ICE officer members of the Federal Police Foundation. Consequently, it caused the Federal Police Foundation to shift its activities and resources to deal with the fallout of this radical change in ICE practices.

9. Addressing the February 18 Memorandum and its consequences has been very time consuming. It has consumed more than 50 percent of the man-hours of the Federal Police Foundation's activity.

10. Addressing the February 18 Memorandum and its consequences has diverted a significant amount of the Federal Police Foundation's resources that would have otherwise been devoted to (a) raising money to fund an organizational website for communicating with members and the public, (b) taking other actions related to the operation of the organization such as registering with various states, (c) negotiating professional liability insurance discounts and other product discounts for members, and (d) conducting campaigns to educate the American public on matters related to federal law enforcement officers.

11. Addressing the February 18 Memorandum and its consequences has caused the Federal Police Foundation to spend $1,017.48 per year ($84.79 per month) in an email communications platform to rapidly provide updates to members on the implementation of the February 18 Memorandum protocols, any changes in the protocols, reports from the field on how the February 18 Memorandum is being implemented and the consequences for officers, and updates regarding the litigation regarding the February 18 Memorandum (both the lawsuit brought by the State of Texas in April

2021 and this case).

12. The Federal Police Foundation is not a union. It does not represent any employees in the workplace, it does not represent employees in any workplace disputes, it does not negotiate on behalf of employees in the workplace, and it does not engage in any collective bargaining. The Foundation does not collect dues from employees and does not have the purpose of dealing with any agency concerning grievances and conditions of employment.

13. Prior to January 20, 2021, it was the common practice for ICE officers to place detainers on illegal aliens that local law enforcement officers had arrested while engaged in their law enforcement duties and had booked into the local jail. In some cases, the detainers were initiated by local law enforcement contacting ICE to notify ICE that they had arrested likely illegal aliens for criminal activity. In other cases, the detainers were initiated by ICE officers screening the inmates in state and local prisons and jails.

14. ICE's EAGLE system maintains and catalogues digital records of all detainers, including those that have been executed, those that are still pending, and those that have been rescinded. Agency procedures require ICE officers to enter into the EAGLE system every detainer that they issue, without exception. ICE officers are also required to enter into the EAGLE system an update indicating when a detainer is canceled, and for what reason.

15. It is my understanding that in approximately March 2021, the Border Patrol in certain southwest

border sectors began issuing new Notices to Report ("NTRs") to illegal aliens, rather than Notices to Appear ("NTAs"). Unlike the NTA, an NTR is not a charging document and does not start a removal proceeding. The NTR asks the alien to report to an ICE office within 60 days. In the event that the alien actually shows up at an ICE office, the ICE officer dealing with the alien is supposed to issue an NT A and initiate the removal proceeding.

16. Attached to this affidavit are ICE talking points that were provided to ICE employees, entitled "ERO Hot Topics, Talking Points." This is an authentic ICE document that states that it is "Current as of August 6, 2021." It states that the NTR documents are intended "to enable CBP to release individuals without federal immigration charges; they are requested to report to ICE for issuance of an appropriate charging document, such as a Notice to Appear." It also states that from March 21, 2021, to July 30, 2021, CBP released 65,531 migrants with NTRs; but only 8,582 migrants reported to ICE for issuance of a charging document.

17. Under current ICE policies and procedures, if ICE determines not to remove a foreign national, the reason for that determination must be recorded in the EAGLE system.

18. Under current ICE policies and procedures, if ICE declines to take custody of an alien who is encountered in the custody of another law enforcement agency (such as a local sheriff's office) because of the February 18 Memorandum, that decision must be documented in the EAGLE system.

19. Because ICE's decisions to lift detainers or to not take enforcement actions against illegal aliens in the custody of state and local law enforcement agencies are supposed to be recorded in the EAGLE system, it is my belief that ICE could comply with a court order directing ICE to reinstate detainers or to take other enforcement actions, where the alien in question is still in the custody of the relevant law enforcement agency.

20. I have personal knowledge concerning the information contained in this Affidavit.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Christopher L. Crane
Christopher L. Crane

SUBSCRIBED AND SWORN TO before me this 25th day of August, 2021.

[SEAL] /s/ Zachary Kurt Thomas
Notary Public

[SEAL] U.S. Immigration and Customs Enforcement

ERO HOT TOPICS TALKING POINTS

Notice to Report Plus (NTR+)

Bottom Line

U.S. Customs and Border Protection (CBP) is implementing **Notice to Report Plus (NTR+)** – an expedited process for paroling noncitizens and placing individuals in ICE's Alternatives to Detention (ATD) process. These individuals have not been issued federal immigration charges due to CBP's inability to keep pace with illegal border crossings.

Supporting Information

NTR Basics

- In March 2021, CBP retrofitted several existing forms – I-385 Booking Record and G-56 Call-In Notice – to enable CBP to release individuals without federal immigration charges; they are requested to report to ICE for issuance of an appropriate charging document, such as a Notice to Appear.
- The process was created in response to surging apprehensions and inability to keep pace with processing responsibilities.
- The lack of reporting by NTR cases has been a persistent challenge. From March 21, 2021, to July 30, 2021, CBP has released **65,531** migrants under the NTR process; only **8,582** of those individuals have reported to ICE for issuance of a charging document.

New NTR+ Process

- The new NTR+ will provide an additional layer of accountability; these individuals will be released via immigration parole and enrolled into ATD. CBP will issue them I-385 Booking Record, G-56 Call-In Notice, and I-94 Arrival/Departure form.
- NTR+ reduces processing times and lessens the risk of overcrowding, but **NTR+ does not solve existing challenges. Noncitizens will still be released from CBP custody without federal immigration charges, and ICE will still be responsible for issuing charging documents upon reporting to ICE.**

Interim Enforcement Priorities

Under the February 18, 2021, memo, *Interim Guidance: Civil Immigration Enforcement Priorities,* ICE will focus its limited enforcement and removal resources on cases presumed to be priorities.

- Priority Category 1: **National Security**
- Priority Category 2: **Border Security**
- Priority Category 3: **Public Safety**

Note: The interim priorities do not prohibit the arrest, detention, or removal of any noncitizen who does not meet the above presumptive priorities but are deemed to be a threat to public safety by local Field Office Directors.

Terminology Changes

The April 19, 2021, ICE memo, *Updated Terminology for Communications and Materials,* aligns ICE communications with the Biden Administration's guidance regarding immigration terminology. The following table lists prior terminology and the

replacement lexicon that ICE will use moving forward.[1]

Previous	New
Alien	Noncitizen or migrant
Alienaege	Noncitizenship
Undocumented alien	Undocumented noncitizen or undocumented individual
Unaccompanied alien children	Unaccompanied noncitizen children
Illegal alien	Undocumented noncitizen or undocumented individual
Assimilation	Integration, civic integration
Immigrant Assimilation	Immigrant integration
Refugee assimilation	Refugee Integration

Current as of August 6, 2021

[1] As needed and appropriate, personnel may use applicable terms def med m the Immigration and Nationality Act in legal or operational documents, including required forms. When citing a statute or regulation, or when completing an I-862, Notice to Appear, I-863, Notice of Referral to Immigration Judge, or similar document(s), personnel may use the term "alien" if legally required.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

Civil Action No. 3:21-CV-00168

[Dated: August 20, 2021]

SHERIFF BRAD COE in his official capacity and KINNEY COUNTY, TEXAS; SHERIFF J.W. GUTHRIE in official capacity and EDWARDS COUNTY, TEXAS; SHERIFF EMMETT GUTHRIE in his official capacity and MCMULLEN COUNTY, TEXAS; SHERIFF ARVIN WEST in his official capacity and HUDSPETH COUNTY, TEXAS; SHERIFF LARRY BUSBY in his official capacity and LIVE OAK COUNTY, TEXAS; THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., President, in his official capacity; THE UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; TAE JOHNSON,

Acting Director of U.S. Immigration and Customs Enforcement, in his official Capacity; IMMIGRATION AND CUSTOMS ENFORCEMENT; TROY MILLER, Senior Official Performing the Duties of Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION,	)
Defendants.	)

AFFIDAVIT OF J.W. GUTHRIE

I, J.W. Guthrie, hereby declare:

I make the statements in this Affidavit based on my own personal knowledge, being duly sworn on oath, and if called to testify, I could and would do so competently as follows:

1. I am J.W. Guthrie, a plaintiff in the above-captioned case.

2. I am the elected sheriff of Edwards County, Texas. I have served in that capacity since January 1, 2021.

3. As sheriff, I oversee the Edwards County Jail, which can house 20 inmates to 24 inmates depending on the gender makeup of the population. It costs my office $50.80 per person, per day to detain someone in our jail.

4. Since February 2021, there has been a significant increase in illegal immigration through Edwards

County and in the number of crimes committed by individuals involving illegal aliens in Edwards County.

5. As a result of this increase in crimes committed by illegal aliens and in the crimes committed by those aiding and abetting illegal aliens since February 2021, there has been a significant increase in the number of persons arrested for criminal activity and detained in the Edwards County Jail. During the period of February-July 2020, there were 60 people booked into the jail by county officers and Texas Department of Public Safety (DPS). During the period of February-July 2021, there were 97 people booked into the jail by county officers and Texas DPS. That is an increase of 62 percent.

6. Due to the fact that ICE is no longer taking custody of most illegal aliens who have committed crimes in Edwards County, and due to the more severe nature of the crimes committed during the border crisis that followed, the average period of detention for illegal alien criminals has become longer.

7. At any given time prior to and including January 2021, the population of inmates in our jail was almost always 9 or fewer. Starting in February 2021, the population of inmates has been 18-21. As a result, the number of inmates detained per day has doubled.

8. Of the 19 inmates currently detained in our jail, 16 are either illegal aliens or directly involved with illegal aliens.

9. The vast majority of detainees that my office has arrested since February 2021 are either illegal aliens or persons involved in activity relating to illegal

immigration.

10. The cost of these extra detentions to Edwards County has been significant. The cost of detaining the additional inmates (over and above the normal inmate population) since February 2021 has been approximately $15,240 per month. As of August 1, 2021, the additional cost of these detentions exceeded $91,000. No federal agency has reimbursed Edwards County for those costs.

11. In addition to the detentions discussed above, the Border Patrol has been using a single cell in our jail. as a temporary holding facility for illegal aliens. The number of illegal aliens booked into that cell has increased, from 22 during February-July 2020 to 69 during February-July 2021. However, the Border Patrol reimburses the jail for those detention costs in that single cell that they utilize.

12. Because ICE and CBP are no longer taking custody of most illegal aliens who have been arrested or convicted of at a crime in Edwards County, many of those criminals are being released into our county.

13. The surge in illegal alien crime after February 18, 2021, has endangered the public in Edwards County. The crimes committed by illegal aliens include criminal trespass, criminal mischief (destruction of property), sexual assault, human smuggling, evading arrest, narcotics violations, theft of vehicles, and burglary.

14. The surge in illegal alien crime after February 2021 has diverted my deputies from their other law enforcement duties. It has also increased the law

enforcement costs to my office.

15. After February 18, 2021, an ICE officer informed me that ICE was no longer able to respond to my requests that ICE take custody of criminal illegal aliens because ICE officers were no longer permitted to deport them. He told me, "Don't bother to call, because we can't come get them."

16. In one instance, my deputies arrested an illegal alien after February 18, 2021, for aggravated sexual assault. My office contacted ICE to ask them to take custody of the illegal alien and deport him, as had been the practice in such cases prior to February 18, 2021. The ICE representative stated that they were no longer able to pick up such aliens, and were therefore unable to take custody of this criminal illegal alien.

17. In another instance, after February 18, 2021, my deputies arrested an illegal, alien for a narcotics violation. My office contacted ICE to ask them to take custody of the illegal alien and deport him, as had been the practice in such cases prior to February 18, 2021. The ICE representative said no. ICE was no longer able to take custody of such aliens.

18. The illegal aliens we are arresting for various criminal offenses are also posing a COVID threat to our county and to our personnel in particular. In one case, an alien smuggler was apprehended by Texas DPS and placed in custody. He was in our jail for 8 days, when we learned that he had COVID-19. Shortly after we learned of this, our jail administrator and dispatcher came down with COVID-19. Additionally, two inmates that were in the same cell tested positive for COVID-

19.

19. I have personal knowledge concerning the information contained in this Affidavit.

FURTHER AFFIANT SAITH NAUGHT.

/s/ J.W. Guthrie
J.W. Guthrie

SUBSCRIBED AND SWORN TO before me this 20 day of August, 2021.

[SEAL] /s/ April Dawn Leighton
Notary Public

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

Civil Action No. 3:21-CV-00168

[Dated: August 23, 2021]

SHERIFF BRAD COE in his official capacity and KINNEY COUNTY, TEXAS; SHERIFF J.W. GUTHRIE in official capacity and EDWARDS COUNTY, TEXAS; SHERIFF EMMETT GUTHRIE in his official capacity and MCMULLEN COUNTY, TEXAS; SHERIFF ARVIN WEST in his official capacity and HUDSPETH COUNTY, TEXAS; SHERIFF LARRY BUSBY in his official capacity and LIVE OAK COUNTY, TEXAS; THE FEDERAL POLICE FOUNDATION, ICE OFFICERS DIVISION,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., President, in his official capacity; THE UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; TAE JOHNSON,

Acting Director of U.S. Immigration and Customs Enforcement, in his official Capacity; IMMIGRATION AND CUSTOMS ENFORCEMENT; TROY MILLER, Senior Official Performing the Duties of Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION,	)
Defendants.	)

AFFIDAVIT OF EMMETT SHELTON

I, Emmett Shelton, hereby declare:

I make the statements in this Affidavit based on my own personal knowledge, being duly sworn on oath, and if called to testify, I could and would do so competently as follows:

1. I am Emmett Shelton, a plaintiff in the above-captioned case.

2. I am the elected sheriff of McMullen County, Texas. I have served in that capacity since January 10, 2013.

3. As sheriff, I am responsible for the detention of criminals arrested for the commission of crimes in McMullen County. Because the County does not have its own jail facility, the sheriffs office detains individuals arrested for the commission of crimes in McMullen County in the jails of Live Oak County and Atascosa County at a cost of $55.00 and $48.00 per day, pre inmate, respectively.

4. Since February 2021, there has been a significant increase in illegal immigration through McMullen County and in the number of crimes committed by illegal aliens and individuals smuggling illegal aliens in McMullen County.

5. As a result of this increase in crimes committed by illegal aliens and in the crimes committed by individuals smuggling illegal aliens since February 2021, there has been a massive increase in the number of persons arrested for crimes in McMullen County.

6. During the period of February-July 2020, 54 people were arrested for criminal activities. During the period of February-July 2021, 451 people were arrested for criminal activities. The number of criminal arrests in 2021 is therefore more than eight times what it was during the same period in 2021.

7. There has also been a dramatic increase in the number of people charged with smuggling aliens in McMullen County. During February-July 2020, only one person was charged with human smuggling. During the same period in 2021, 26 people were charged with human smuggling.

8. Because so much human smuggling has been occurring through McMullen County since February 2021, there has also been a marked increase in the number of vehicle pursuits. During February-July 2020, there were 8 pursuits. During February-July 2021, there were 25 pursuits. The number more than tripled.

9. Associated with these pursuits is the towing and impoundment of disabled vehicles used by the migrant

smugglers. That number too has increased a great deal. During February-July 2020 there were 13 vehicle recoveries. During 2021 there were 34 vehicle recoveries.

10. As a result of this sharp increase in crime caused by illegal aliens and those smuggling illegal aliens, McMullen County's criminal detention costs have risen, from $52,870 during February-July 2020 to $85,024 during February-July 2021. That is an increase of $32,154.

11. A significant portion of these increased detention costs are specifically attributable to the increase in human smuggling that began in February 2021. McMullen County's costs for the incarceration of the smugglers of illegal aliens, some of whom have been illegal aliens and some of whom have been U.S. citizens, have risen nearly sevenfold, from $3,696 during February-July 2020 to $24,180 during February-July 2021. Those costs are not reimbursed by any federal agency.

12. The increase in illegal alien crime that started in February 2021 has endangered the public in McMullen County. The crimes committed by illegal aliens include criminal mischief (destruction of property), aggravated assault with a deadly weapon, smuggling of persons, trafficking of persons, and evading arrest. In addition, vehicle pursuits caused by smugglers evading arrest have endangered other drivers using our roads, and the destruction of fences has cost McMullen County property owners thousands of dollars.

13. The surge in illegal alien crime that started in February 2021 has diverted my deputies from other law enforcement duties. It has also increased other law enforcement costs to my office, in addition to detention costs.

14. I have personal knowledge concerning the information contained in this Affidavit.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Emmett Shelton
Emmett Shelton

SUBSCRIBED AND SWORN TO before me this 23rd day of August, 2021.

[SEAL] /s/ Jaclyn Seidel
Notary Public

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS VICTORIA DIVISION

Civ. Action No. 6:21-cv-00016

[Filed: October 25, 2021]

STATE OF TEXAS; STATE OF LOUISIANA,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and

Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS VICTORIA DIVISION

Civ. Action No. 6:21-cv-00016

STATE OF TEXAS, STATE OF LOUISIANA

Plaintifsf,

v.

UNITED STATES OF AMERICA, *et al.,*

Defendants.

DECLARATION OF BILL E. WAYBOURN

I, Bill Waybourn, pursuant to 28 U.S.C. § 1746, testify that:

1. I make this declaration based on my own personal and professional knowledge, as well as the information available to me in my positions in public service.

2. I currently serve as the Sheriff of Tarrant County, Texas. I have been in that position since 2017 and have been a law enforcement professional since 1981.

3. In 1981, I began working for Dalworthington Gardens Police Department. I was promoted to Chief of Police in 1984. After leading the transition to combine the police and fire services of Dalworthington Gardens, I became the Chief of Public Safety in 1988. I was Chief of Dalworthington Gardens for 31 years before being elected Sheriff of Tarrant County.

4. As Sheriff of Tarrant County, I am responsible for enforcing the criminal laws of Texas to keep the peace within the county, and operating county jails.

5. In addition, the Sheriff of Tarrant County has been deputized by the Department of Homeland Security (DHS) to enforce federal immigration law, pursuant to a Memorandum of Agreement executed under Section 287(g) of the Immigration and Nationality Act. Section 287(g) allows DHS and law enforcement agencies to make agreements that require the state and local officers to receive training and work under the supervision of Immigration and Customs Enforcement (ICE). ICE provides the officers with authorization to identify, process, and detain illegal aliens they encounter during their routine law-enforcement activity. Fingerprint data taken at county jail bookings are sent to ICE, which can request that jails hold aliens

who are arrested on suspicion of crimes for up to 48 hours, giving its agents time to decide whether to take the person into federal custody and pursue deportation.

6. Tarrant County on average has around 280-300 inmates in custody who have immigration detainers. As of now, we have 209 such inmates in our jails out of a total population in custody of around 4200.

7. The 209 inmates in custody with immigration detainers at this time have charges of Class B misdemeanor or higher violations of state law pending among them. The highest level charges against these inmates include 12 charges of murder, 5 charges of aggravated robbery, 7 charges of sexual assault or aggravated sexual assault, 3 charges of aggravated kidnapping, 27 charges of sexual assault of a child, 27 charges of aggravated sexual assault of a child, 51 charges of aggravated assault with a deadly weapon, 15 charges of family violence assault, 17 charges of possession or manufacturing of a controlled substance, and 11 charges of driving while intoxicated. This is fairly representative of the charges such populations have at any given time in custody in our jails.

8. On April 21 of 2021, my office examined the recidivism rates for the inmates in custody. We did this by examining the criminal history files of every inmate in custody with an immigration detainer at that point in time. We found a recidivism rate (indicated by prior jail time) of

73.68% for that population.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 23, 2021.

/s/ Bill E. Waybourn
Bill E. Waybourn
Sheriff
Tarrant County Sheriff's Office

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

No. 3:21-cv-00168

[Filed: December 15, 2021]

SHERIFF BRAD COE, *et al.*	)
	)
Plaintiffs,	)
	)
v.	)
	)
JOSEPH R. BIDEN, JR., *et al.*	)
	)
Defendants.	)
	)

DEFENDANTS' MOTION TO DISMISS

[*Table of Contents and Table of Authorities Have Been Omitted for Printing Purposes*]

INTRODUCTION

In early 2021, the Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE") adopted interim immigration enforcement priorities to focus their limited enforcement resources on those noncitizens who posed the greatest risk to national security, border security,

and public safety. These interim priorities were to remain in effect, pending Department-wide review of policies and practices, until DHS issued revised immigration enforcement guidelines. After careful consideration and engagement with agency personnel, the Secretary of Homeland Security issued a new memorandum to guide officials in prioritizing noncitizens for apprehension and removal. The New Guidance retains the three priorities of national security, border security, and public safety, but gives greater discretion to line officers to assess the totality of the facts and circumstances, including aggravating and mitigating factors, in determining whether an individual poses a current threat and should be subject to an enforcement action.

Plaintiffs—a group of Texas counties and sheriffs as well as an organization claiming ICE officers as its members—have brought suit challenging both the Interim Guidance and the New Guidance, arguing that DHS's enforcement priorities conflict with statutory provisions that, in their view, unconditionally require the undifferentiated arrest and detention of entire classes of noncitizens, regardless of their individualized circumstances, regardless of the safety and security consequences, and regardless of the feasibility and negative consequences on other agency operations.

Plaintiffs' Second Amended Complaint fails to clear multiple threshold hurdles and thus should be dismissed. First, Plaintiffs' challenge to the Interim Guidance is moot. Second, Plaintiffs fail to allege a plausible injury traceable to DHS's New Guidance. Third, the Galveston Division of the Southern District

of Texas is an improper venue for this lawsuit. Fourth, the Administrative Procedure Act bars Plaintiffs' claims in multiple ways, including because immigration enforcement prioritization is committed to agency discretion by law. Finally, the Court should at minimum dismiss Plaintiffs' request for relief against the President, because the Court lacks authority to grant declaratory or injunctive relief against him, and the claims of the Federal Police Foundation, which are barred by the Civil Service Reform Act.

BACKGROUND

I. Statutory Framework.

The Immigration and Nationality Act ("INA") establishes the framework for arresting, detaining, and removing noncitizens who are unlawfully present or otherwise removable from the United States. A "principal feature of th[is] removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012).[1]

The removal process typically begins when DHS, in its discretion, initiates a removal proceeding against a noncitizen. *See* 8 U.S.C. § 1229(a); 8 C.F.R. § 239.1; *see also, e.g.*, 8 U.S.C. §§ 1225(b); 1228(b); 1187(b)(2); 1231(a)(5); 8 C.F.R. § 1208.31(e) (instances of more limited proceedings in specific circumstances). DHS has discretion to choose which charges of removability to pursue. *See* 8 U.S.C. § 1229a(a)(2). If the noncitizen is placed into proceedings before an immigration judge

[1] Internal quotation marks and citations are omitted throughout this brief, unless otherwise stated.

("IJ"), the IJ ultimately determines whether the noncitizen is removable on the charged grounds, and if so, whether to enter an order of removal. *See* 8 U.S.C. § 1229a(a); 8 C.F.R. § 1240.12. A noncitizen subject to a removal order from an IJ may file an appeal before the Board of Immigration Appeals ("BIA"), 8 C.F.R. §§ 1003.1(b), 1240.15, and the removal order is stayed pending the appeal, 8 C.F.R. § 1003.6(a). If the BIA dismisses the appeal, the noncitizen may then petition for review in a federal court of appeals, and request a further stay of removal pending review. 8 U.S.C. § 1252(a)(5). Once an order of removal is final, *see id.* § 1101(a)(47)(B), and absent a stay, the noncitizen is subject to removal, *see id.* §§ 1231(a)(1)(A), (a)(B)(ii). "At each stage" of this removal process, "the Executive has discretion to abandon the endeavor." *Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 483 (1999).

This case concerns 8 U.S.C. §§ 1225, 1226, and 1231. Sections 1225 and 1226 establish procedures by which DHS "decide[s] (1) who may enter the country and (2) who may stay here after entering." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Section 1225 authorizes certain actions, including expedited removal, with regard to a noncitizen who is an "applicant[] for admission," that is, a noncitizen who is "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .)." 8 U.S.C. § 1225(a)(1). Section 1226, which "governs the process of arresting and detaining" noncitizens, "distinguishes between two different categories of aliens." *Jennings*, 138 S. Ct. at 837. Section 1226(a) applies generally to

authorize the arrest and detention of noncitizens, pending a determination on removal from the United States. Section 1226(c) specifically covers noncitizens "who fall[] into one of several enumerated categories involving criminal offenses and terrorist activities," *id.*, and notes that DHS "shall take" these noncitizens "into custody . . . when [they are] released[]" from criminal confinement. 8 U.S.C. § 1226(c)(1). Importantly, § 1226(c) does not envision that covered noncitizens will always be arrested *immediately* following release. *See Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (§ 1226(c)'s instruction that officials "shall act" is meant to "exhort[] [DHS] to act quickly," but does not preclude arrests "well after their release[]"). And § 1226(c) only precludes release of covered noncitizens once they are taken into custody and proceedings are initiated. 8 U.S.C. § 1226(c)(2).

Once a removal order becomes final, § 1231 sets out DHS's detention and removal authority. Section 1231(a) sets a "removal period" of 90 days that begins when the removal order becomes "administratively final," judicial review staying the removal concludes, or the noncitizen "is released from [criminal or non-immigration] detention or confinement," whichever comes latest. 8 U.S.C. § 1231(a)(1)(B)(i)-(iii). Section 1231(a)(2) authorizes detention during the removal period and mandates it for certain criminal noncitizens. *Id.* § 1231(a)(2). Congress, however, "doubt[ed]" that "all reasonably foreseeable removals could be accomplished" within the 90-day period, *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), and so § 1231 permits—but does not require—detention and removal after the removal period. *Id.*; *see* 8 U.S.C.

§§ 1231(a)(1)(C), (a)(6). Generally, outside those authorities, a noncitizen subject to a final order of removal may be released on an order of supervision. *Id.* § 1231(a)(3).

Section 1231(a)(5), which is at issue here, applies when a noncitizen who has previously been removed (or voluntarily departed "under an order of removal") reenters the United States illegally. That provision curtails any statutory right to relief the noncitizen otherwise would have had, and states that the noncitizen "shall be removed under the prior order at any time." 8 U.S.C. § 1231(a)(5).

To take custody of removable noncitizens, DHS may use a number of enforcement tools, including immigration detainers. Through a detainer, DHS notifies a State or locality that DHS intends to take custody of a removable noncitizen detained by the State or locality upon his or her release, and asks the State or locality to (1) notify DHS of the noncitizen's release date; and (2) hold the noncitizen for up to 48 hours, until DHS can take custody. *See* 8 C.F.R. § 287.7(a) (describing notification of release), (d) (describing temporary detention request); ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers ¶ 2.7, *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf (last visited Dec. 15, 2021) ("ICE Policy No. 10074.2"). Since April 2, 2017, ICE detainers must be accompanied by a signed administrative warrant of arrest issued under 8 U.S.C. §§ 1226 or 1231(a), and may be issued only to noncitizens arrested for criminal offenses and whom immigration officers have probable

cause to believe are removable. *See* ICE Policy No. 10074.2 ¶¶ 2.4-2.6. The 2017 policy further provides that should ICE officers determine not to take custody of a noncitizen, the officers must immediately rescind the detainer. *Id.* ¶ 2.8.

II. Guidance Memoranda Concerning Immigration Enforcement.

A. Issuance of Interim Guidance

On January 20, 2021, then-Acting Secretary of Homeland Security David Pekoske issued a memorandum titled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities." *See* Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), ECF No. 33-1 (the "Pekoske Memo"). The Pekoske Memo made note of DHS's inherent resource limitations and the "significant operational challenges" it faces due to the COVID-19 pandemic, and, in light of these considerations, called upon DHS "components to conduct a review of policies and practices concerning immigration enforcement." *Id.* at 1. Consistent with longstanding historical practice, Acting Secretary Pekoske instructed DHS components to develop recommendations concerning, among other things, "policies for prioritizing the use of enforcement personnel, detention space, and removal assets[]" and "policies governing the exercise of prosecutorial discretion[.]" *Id.* at 2.

The Pekoske Memo also adopted two interim

measures. First, the Pekoske Memo directed DHS to focus its enforcement efforts on individuals implicating (1) national security; (2) border security; or (3) public safety. *Id.* At the same time, it expressly authorized enforcement activities outside of those categories. *Id.* at 3. Second, the Pekoske Memo paused most removals for 100 days while DHS reviewed its policies. *Id.* Another court in this district preliminarily enjoined this second measure but it has, regardless, since expired on its own terms.

On February 18, 2021, ICE issued a memorandum to operationalize the enforcement priorities in the Pekoske Memo. *See* Memorandum from Tae Johnson, Acting Dir. of U.S. Immigration and Customs Enf't, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), ECF No. 33-2 (the "ICE Interim Guidance"). The ICE Interim Guidance confirmed that "ICE operates in an environment of limited resources," and "necessarily must prioritize[]" certain "enforcement and removal actions over others" in order to "most effectively achieve" its "critical national security, border security, and public safety mission[.]" *Id.* at 2-3. The ICE Interim Guidance then catalogued the three priority groups identified in the Pekoske Memo, as slightly modified, and reiterated that the interim priorities do not "prohibit the arrest, detention, or removal of any noncitizen." *Id.* at 3. Enforcement actions outside the presumed priorities could proceed when warranted by the circumstances, and generally subject to a local supervisor's approval.

While the ICE Interim Guidance was in effect, DHS was able to shift resources to both focus on those posing

greater public safety threats and other important agency missions. As just one example, "arrests of those with aggravated felonies—priority #3 (public safety)—were up by roughly 2,000 from the prior year; they now account for one in five arrests." *Texas v. United States*, 14 F.4th 332, 335 (5th Cir. 2021), *opinion vacated on rehearing en banc* (Nov. 30, 2021) ("*Texas* Stay Op.").

B. Litigation on Interim Guidance

Four lawsuits were brought challenging the Pekoske Memo and the ICE Interim Guidance (collectively "the Interim Guidance"). In this Court, Plaintiffs brought a motion seeking to preliminary enjoin the Interim Guidance. Also in the Southern District, the States of Texas and Louisiana sought an injunction on substantially similar claims. That court granted the preliminary injunction, but, in a unanimous published decision, the Fifth Circuit largely stayed that injunction pending appeal. *Texas* Stay Op., 14 F.4th 332. In doing so, the Fifth Circuit disagreed with the district court's conclusion that two detention provisions "override the deep-rooted tradition of enforcement discretion when it comes to decisions that occur before detention, such as who should be subject to arrest, detainers, and removal proceedings." *Id*. at 340; *id*. at 338 ("What is more, in the quarter century that IIRIRA has been on the books, no court at any level previously has held that sections 1226(c)(1) or 1231(a)(2) eliminate immigration officials' discretion to decide who to arrest or remove."). The Fifth Circuit stayed the injunction except to the extent it prevented DHS "from relying on the memos to *release* those who

are facing enforcement actions and fall within the mandatory detention provisions," seeing "no basis for upsetting it at this stage as that is what the statutes govern." *Id.* at 337 (emphasis added). Indeed, consistent with longstanding DHS practice, DHS does not as a general matter release individuals who are in ICE custody and who (i) are in removal proceedings and fall under 8 U.S.C. § 1226(c); or (ii) have final removal orders, are in the removal period, and, pursuant to 8 U.S.C. § 1231(a)(2), have been found inadmissible under 8 U.S.C. §§ 1182(a)(2) or 1182(a)(3)(B) or deportable under §§ 1227(a)(2) or 1227(a)(4)(B). After the Interim Guidance was revoked and superseded by the New Guidance, the Fifth Circuit granted rehearing en banc and vacated the opinion and stay. *See* Order, *Texas v. United States*, No. 21-40618 (5th Cir. Nov. 30, 2021). The court did not specify the grounds upon which its vacatur rested.

Two other suits also sought to preliminarily enjoin the Interim Guidance. A Florida district court denied Florida's motion for preliminary injunction, holding that the Interim Guidance is not final agency action and, in any event, is committed to agency discretion. *See Florida v. United States*, No. 8:21-CV-541-CEH-SPF, 2021 WL 1985058, at *9 (M.D. Fla. May 18, 2021) ("The policies do not change anyone's legal status nor do they prohibit the enforcement of any law or detention of any noncitizen."); *id.* at *10 ("Even if the Court were to conclude the agency action is final reviewable action, the Court agrees with Defendants that the memoranda reflect discretionary agency decisions related to the prioritization of immigration enforcement cases, which are presumptively not subject

to judicial review."). Florida appealed, and the matter was fully submitted to the Eleventh Circuit. After the Eleventh Circuit directed the parties to file supplemental briefs addressing whether the New Guidance mooted Florida's challenge to the Interim Guidance, Florida filed an unopposed motion to dismiss its appeal as moot and for vacatur of the district court opinion.

Next, an Arizona district court dismissed Arizona and Montana's suit and denied their motion for preliminary injunction, finding that immigration enforcement priorities are committed to agency discretion and, therefore, not subject to judicial review. *See Arizona v. U.S. Dep't of Homeland Sec.*, No. CV-21-00186-PHX-SRB, 2021 WL 2787930, at *10 (D. Ariz. June 30, 2021) ("While [the States] may not agree with this prioritization scheme, [the States'] allegations in their Amended Complaint do not 'rise to a level that would indicate' that the Government is *abdicating* its responsibility to remove noncitizens with final orders of removal from the United States.") (emphasis in original). The Ninth Circuit twice denied Arizona's and Montana's motions for an injunction pending appeal. *See Arizona v. United States*, Case No. 21-16118 (9th Cir. July 30, 2021, and Sept. 3, 2021). Defendants recently filed a motion to dismiss the appeal, and the States have not yet taken a position on the motion.

C. New Guidance

On September 30, 2021, the Secretary issued the memorandum at issue here, "Guidelines for the Enforcement of Civil Immigration Law" ("New Guidance"). *See* New Guidance, ECF No. 58-1. The

seven-part "memorandum provides guidance for the apprehension and removal of noncitizens." *Id.* at 1. The New Guidance does not cover detention. The first part explains the foundational principle of the exercise of prosecutorial discretion. *See, e.g.*, *id.* at 2 (underscoring how it is "well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders"). The next part provides the substantive provisions prioritizing national security, public safety, and border security. *Id.* at 3-4. The third part seeks to ensure that DHS exercises its "discretionary authority in a way that protects civil rights and civil liberties." *Id.* at 5. Fourth, the New Guidance guards against the "use of immigration enforcement as a tool of retaliation." *Id.* Fifth, through training, data collection, and quality review mechanisms, DHS seeks to ensure that line officers apply the New Guidance with integrity and quality while leaving "the exercise of prosecutorial discretion to [their] judgment." *Id.* at 5-6. Sixth, the New Guidance set November 29, 2021, as the effective date, which also served to rescind the Pekoske Memo and the ICE Interim Guidance. *Id.* at 6-7. And, last, the New Guidance contains a statement that it confers no "right or benefit." *Id.* at 7.

For the substantive provisions in Part II, the New Guidance maintains the three categories from the Interim Guidance—national security, border security, and public safety—but the New Guidance functions in a distinctively different manner, particularly with respect to the public-safety category. *See id.* at 3-4. Rather than creating presumed priority categories, the

New Guidance avoids "bright lines or categories" and instead "requires an assessment of the individual and totality of the facts and circumstances." *Id.* at 3. With this as the backdrop, the New Guidance then includes a non-exclusive list of aggravating factors (*e.g.*, "the gravity of the conviction and sentence imposed[]" or "the sophistication of the criminal offense[]") and mitigating factors (*e.g.*, "military service" or "time since an offense and evidence of rehabilitation[]"). *Id.* at 3-4. Further, in emphasizing discretion in this realm, the New Guidance notes that "[t]he overriding question is whether the noncitizen poses a current threat to public safety." *Id.* at 4. Likewise, for border security, the New Guidance underscores that "[DHS] personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." *Id.*

III. Litigation History.

Plaintiffs filed their Complaint challenging the Interim Guidance on July 1, 2021, and their Second Amended Complaint challenging both the Interim Guidance and the New Guidance on October 8, 2021.[2] In their Second Amended Complaint, Plaintiffs assert claims under the INA, the Administrative Procedure Act ("APA"), and the Take Care Clause of the Constitution.

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[2] Plaintiffs filed a motion for preliminary injunction against the Interim Guidance on July 8, 2021.

ARGUMENT

Defendants move to dismiss the Second Amended Complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Rule 12(b)(1) dismissal is required if the court "lacks the statutory or constitutional power to adjudicate the case." *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). The plaintiff bears the burden of "demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Renne v. Geary*, 501 U.S. 312, 316 (1991). In assessing its jurisdiction, a court may rely upon: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *In re S. Recycling, L.L.C.*, 982 F.3d 374, 379 (5th Cir. 2020).

The Court should also dismiss for improper venue. Fed. R. Civ. P. 12(b)(3). "[T]he plaintiff has the burden of demonstrating that the chosen venue is proper." *Graham v. Dyncorp Int'l, Inc.*, 973 F. Supp. 2d 698, 700 (S.D. Tex. 2013). "[T]he court must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff," when assessing venue. *Id.* (quoting *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 Fed. App'x 612, 615 (5th Cir. 2007) (per curiam)).

I. Plaintiffs' Challenge to the Interim Guidance is Moot.

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies," and do not have "the power 'to decide

questions that cannot affect the rights of litigants in the case before them.'" *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). In other words, "[m]ootness applies when intervening circumstances render the court no longer capable of providing meaningful relief to the plaintiff." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 425 (5th Cir. 2013).

Here, intervening circumstances preclude the Court from providing any meaningful relief to Plaintiffs on their challenge to the Interim Guidance. Plaintiffs' challenge to the January 20 and February 18 Memoranda became moot once those memoranda "expired by [their] own terms." *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (challenge to validity of bill became moot when "that bill expired by its own terms"); *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020) (holding that "a law's automatic expiration" moots the case); *see Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (claim is moot where it would be impossible for plaintiffs to obtain "any effectual relief" even if they were to prevail on their claims); *Norfolk S. Ry. Co. v. City of Alexandria*,

608 F.3d 150, 161 (4th Cir. 2010) (when a court's "resolution of an issue could not possibly have any practical effect on the outcome of the matter," case must be dismissed). In the January 20, 2021, Memorandum, the Acting Secretary of Homeland Security stated that the Department's interim guidance in Section B, *i.e.*, the Interim Guidance challenged here, would "remain in effect until superseded by revised priorities developed in connection with the review directed in section A." *See* Pekoske Memo at 3. Likewise, because the February 18 Memorandum implemented the January 20 Memorandum, it also expired by its own terms when new superseding guidance took effect. *See* ICE Interim Guidance at 1 ("This memorandum establishes interim guidance in support of the interim civil immigration enforcement and removal priorities that Acting Secretary Pekoske issued on January 20, 2021."). The New Guidance did just that: It stated explicitly that upon its effective date of November 29, 2021, "this guidance will serve to rescind (1) the January 20, 2021 Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities issued by then-Acting Secretary David Pekoske, and (2) the Interim Guidance: Civil Immigration Enforcement and Removal Priorities issued by Acting ICE Director Tae D. Johnson." *See* New Guidance at 6.

Accordingly, the Interim Guidance is no longer in effect and Plaintiffs' challenge to it is now moot. This

Court should dismiss Plaintiffs' challenge to the Interim Guidance.[3]

II. The Court Should Dismiss All Other Claims in the Second Amended Complaint.

The Court should dismiss all of Plaintiffs' claims related to the New Guidance for any of multiple independent reasons. First, the Plaintiffs cannot establish Article III standing to sue, and the Court therefore lacks jurisdiction. Second, venue in the Southern District of Texas is improper. Third, the Plaintiffs' claims are barred by multiple threshold requirements of the APA. These same defects would also bar Plaintiffs' challenge to the Interim Guidance to the extent this Court finds that those claims are not moot. Accordingly, the Court should dismiss the Second Amended Complaint in full.

A. Plaintiffs lack Article III standing to sue.

Plaintiffs—six Texas sheriffs, seven Texas counties, and the Federal Police Foundation (the "Foundation")—fail to establish that they will suffer any cognizable injury due to the New Guidance. To establish standing to "seek injunctive relief, a plaintiff must show that" it "is under threat of suffering" an "actual and imminent" injury caused by "the challenged action," and that "a favorable judicial decision will prevent" that injury.

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[3] With the consent of the Plaintiff States, Defendants have moved to dismiss their appeal in the Fifth Circuit of the preliminary injunction entered against the Interim Guidance. *See* Consent Motion, *Texas v. United States*, No. 21-40618 (5th Cir. Dec. 6, 2021).

Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009). Any "threatened injury must be *certainly impending* to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added). Additionally, to establish redressability, a plaintiff must show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

1. The Sheriffs and Counties cannot demonstrate any redressable injury that is traceable to the New Guidance.

The Plaintiff Sheriffs and Counties assert that the New Guidance will increase the number of removable or detainable noncitizens in their respective counties, resulting in an increase in crimes (and related costs). *See* Second Amend. Compl. ¶¶ 118-43, ECF No. 59 ("SAC"). As a threshold matter, a litigant "lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Regardless, this theory relies on a speculative chain of events involving independent actions by third parties, and does not show that any injury is "*certainly* impending." *Whitmore*, 495 U.S. at 158 (emphasis added); *see California v. Texas*, 141 S. Ct. 2104, 2117 (2021) ("[W]here a causal relation between injury and challenged action depends upon the decision of an independent third party," standing is "ordinarily substantially more difficult to establish."). Even assuming that the New Guidance will result in a

drop in some enforcement actions, Plaintiffs' theory hinges on the unsupported allegation that the noncitizens spared from enforcement actions due to the New Guidance will not only commit crimes but will commit crimes that require *more* resources than those who, because the priorities focus resources on them, are apprehended instead.[4]

Plaintiffs fail to adequately allege that the purported increase in criminal activity in the Counties is attributable to noncitizens who were spared from immigration enforcement actions due to immigration enforcement prioritization. As an initial matter, Plaintiffs simply allege that certain counties have recently experienced an increase in arrests of noncitizens over the last year due to the commission of unspecified crimes. Although the Complaint alleges an increase in *arrests* of noncitizens by the Counties, that does not necessarily mean there has been an increase in *criminal activity* by noncitizens. Indeed, the lead Plaintiff, Sheriff Brad Coe, was recently quoted explaining his efforts to encourage local landowners to report property crimes that previously went

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[4] In *Texas v. United States*, the Fifth Circuit noted that a Court may consider "offsetting benefits that are of the same type and arise from the same transaction as the costs." 809 F.3d 134, 155 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Here, the offsetting "benefits" (the apprehension, due to the New Guidance, of noncitizens likely to pose a threat to society) is "of the same type" as Plaintiffs' alleged injury (the non-apprehension of other criminal noncitizens) and arise from the same event (the New Guidance).

unreported.[5] Moreover, Sheriff Coe also explained that he could not attribute the recent increase in crime to noncitizens—that it "could be part of illegal alien trafficking or it could just be local meth heads."[6] By the parties' own admission, then, Plaintiffs cannot plausibly allege an increase in crime caused by something other than their own conduct—much less an increase in crimes committed by noncitizens—much less crimes committed by noncitizens who otherwise would have been priorities, but for the challenged Guidance.

More broadly, to support their injury theory, the Sheriffs and Counties allege that the *Interim Guidance* resulted in an increase in crime in their respective counties. But even assuming this speculative assertion were true, it does not show that the *New Guidance* will increase crime in the Counties. In fact, there are material differences between the Interim Guidance and the New Guidance. For example, the New Guidance provides enforcement officials with *more* discretion to take enforcement actions against noncitizens deemed to pose a public safety threat. Although the Interim Guidance focused on those convicted of aggravated

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[5] *See* Aaron Nelson, Kinney County Has Embraced Greg Abbott's Operation Lone Star Like Nowhere Else. It's Fueling the Hysteria of Some Locals, Texas Monthly (Oct. 29, 2021), texasmonthly.com/news-politics/operation-lone-star-kinney-county/. In considering a motion under FRCP 12(b)(1), a court can consider evidence outside the complaint without converting the motion to one for summary judgment. *See Hill v. Rsch. Inst. of Am. Grp.*, 209 F.3d 719 n.1 (5th Cir. 2000).

[6] *See id.*

felonies or participated in certain criminal organizations, *see* ICE Interim Guidance, at 4-5, the New Guidance generally calls on officials to prioritize enforcement actions against those who "pose[] a current threat to public safety." New Guidance, at 3.

Finally, even assuming that any Sheriff or County could establish both an impending injury and a fairly traceable causal link from that injury to the New Guidance, Plaintiffs fail to show that their alleged injuries would "likely" be redressed by a favorable decision. *Laidlaw*, 528 U.S. at 181. Due to resource constraints, *every* Administration must inevitably prioritize certain enforcement actions over others; the only question is *how* it prioritizes. *See Arizona*, 567 U.S. at 396. Thus, even if the Court enjoins the New Guidance, DHS would still have to adopt some prioritization scheme, whether explicitly (through central guidance) or implicitly (by forcing local immigration officials to engage in ad hoc prioritization given the reality of limited resources). Plaintiffs do not allege that the resulting prioritization scheme would result in a decrease in crime—much less that crime would decrease in their respective jurisdictions. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) ("redressability [that] requires speculat[ion]" is insufficient to support standing). Thus, it is purely speculative that a favorable ruling would address Plaintiffs' alleged injuries.

2. Binding Fifth Circuit precedent precludes a finding of injury for the Federal Police Foundation or its members.

The Foundation asserts two injuries due to the New Guidance. First, it contends that its ICE-officer members may suffer an injury because either they will have to follow the New Guidance and allegedly violate their oaths, or they will resist following the New Guidance and be subject to discipline. *See* SAC ¶¶ 153-54. Second, the Foundation tries to establish standing based on a supposed injury from having to advise its members on compliance with the New Guidance. *See* SAC ¶¶ 150-52. Neither injury is cognizable under Fifth Circuit precedent.

The first theory—an "associational standing" theory based on injuries allegedly born by the Foundation's members—fails under the Fifth Circuit's decision in *Crane v. Johnson*, 783 F.3d 244, 253-55 (5th Cir. 2015) (ICE officers and Mississippi lacked standing to challenge DACA). There, the ICE officers asserted that DACA would "compel[] [them] to violate their oath to uphold the laws of the United States," and subject them to potential "employment sanctions if they do not follow the Directive." *Id.* at 253. The Fifth Circuit rejected these theories, noting that (i) an "agent's subjective belief that complying with" a policy "will require him to violate his oath is not a cognizable injury," and (ii) officers could not show they would be subjected to "employment sanctions" since DACA states that "[a]gents shall exercise their discretion in deciding to grant deferred action," making it "unlikely that the agency would impose an employment sanction against

an employee who exercises his discretion to detain an illegal alien." *Id.* at 253-55.

The same reasoning applies here. An officer's subjective belief that following the New Guidance will conflict with his oath "is not a cognizable injury," and the New Guidance expressly vests the officers with discretion to make judgment calls on a case-by-case basis, making it "unlikely" that DHS would impose "employment sanction[s]" on any officer who exercises that discretion. Thus, as a matter of law, the Foundation cannot establish associational standing based on either postulated injury to its members.

The Foundation's second theory—an "organizational standing" theory based on financial costs borne by the Foundation—likewise fails. To establish standing based on an organization's voluntary expenditures, the organization must show that it had to expend "significant resources" in a manner inconsistent with its mission. *Tenth St. Residential Ass'n ("TSRA") v. City of Dallas*, 968 F.3d 492, 495 (5th Cir. 2020). A "setback to the organization's abstract social interests" does not constitute "an injury-in-fact." *Id*. Here, the Foundation has not shown that it will expend any resources, let alone *significant* resources, as a result of the New Guidance. Rather, the Foundation merely asserts that it has had to "advis[e]" its members over the priorities guidance. *See* SAC ¶ 150. Further, investing funds towards educating its members falls squarely within the Foundation's pre-existing mission. Indeed, Plaintiffs specifically allege that one of the Foundation's "purposes" is "informing federal law enforcement officers." SAC ¶ 46. Thus, the Foundation

has not established an injury-in-fact necessary for organizational standing.

B. Venue is improper in the Galveston Division of the Southern District of Texas.

In the alternative, this Court should dismiss the Second Amended Complaint because the Southern District of Texas is an improper venue for Plaintiffs' claims. *See* 28 U.S.C. § 1391(e); *see generally* Mot. to Transfer, ECF No. 32 ("Defs.' Transfer Mot.").[7]

Plaintiffs may not establish venue in a district based on the location of plaintiffs who lack standing. *See Miller v. Albright*, 523 U.S. 420, 426-27 (1998). Although Defendants believe that no party has standing to challenge the New Guidance, the allegations of harm to Galveston County and McMullen County and its Sheriff—the Plaintiffs that reside in the Southern District of Texas—are particularly untethered to the policy being challenged here. For McMullen County and its Sheriff, the operative Complaint claims that there has been an eight-fold increase in the number of arrests in 2021 compared to 2020. SAC ¶ 129. And for to Galveston County, the operative Complaint alleges that overall crime is up because 30% more criminals have been booked into the County jail in 2021. SAC ¶ 134. Plaintiffs' most specific allegations of harm to Galveston and McMullen Counties do not distinguish at all between noncitizens and citizens and lawful residents, and so cannot be attributable to the New Guidance. While Plaintiffs

[7] Defendants reprise their arguments from their pending transfer motion to preserve them.

assert that the increases in arrests and bookings are due to noncitizens unlawfully present in the country, the Court must disregard this unsupported conclusion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009). To the extent that the Court determines that any of the Plaintiffs have adequately alleged injury, it should dismiss the Plaintiffs whose allegations do not support their claim to injury, namely Galveston County and McMullen County and its Sheriff.

Further, Plaintiffs cannot establish venue by referring to Foundation members who serve in the Southern District of Texas because this Court plainly lacks jurisdiction over their claims under the CSRA, *see infra* III.A, and, in any event, those members lack standing, *see supra* II.A.2. Thus, although Defendants contend that no Plaintiff has standing, *see supra* II.A, to the extent the Court finds that any Plaintiff has standing to challenge the New Guidance, it would presumably be Kinney County and its Sheriff, whose claim cannot proceed in this District. *See* 28 U.S.C. § 1391(e).

Thus, the Court should dismiss this action for improper venue. Alternatively, Defendants have filed a motion to transfer this action to the Western District of Texas, in part under 28 U.S.C. § 1406, to cure this jurisdictional defect. Defs.' Transfer Mot. The Court could thus alternatively dismiss this action for improper venue or transfer it to the Western District of Texas.

C. Plaintiffs' claims fail to clear three threshold bars to APA lawsuits.

Three limitations imposed by the APA each independently bars the Plaintiffs' claims. First a court cannot review immigration enforcement priorities because such action is "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). Second, the New Guidance is not "final agency action" subject to review under the APA because it does not alter legal rights or obligations. *See* 5 U.S.C. § 704. Third, numerous provisions of the INA narrowly circumscribe the mechanisms and procedures for judicial review of immigration policies and thereby "preclude judicial review" under the APA. *See* 5 U.S.C. § 701(a)(1).

As an initial matter, all of Plaintiffs' claims—including their claim under the Take Care Clause—are brought pursuant to the APA. Judicial review under the APA expressly includes claims that agency action is "contrary to constitutional right." 5 U.S.C. § 706(2)(B). Plaintiffs may not plead their way around the fundamental principles governing review of agency action by relying on constitutional arguments. *See Charlton Mem. Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass. 1993) (plaintiff's equal protection claim "cannot so transform the case that it ceases to be primarily a case involving judicial review of agency action"); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 n.9 (6th Cir. 2017) (noting that a constitutional claim "is properly reviewed on the administrative record"), *cert. denied*, 138 S. Ct. 2648 (2018) (mem.); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1232 (D.N.M. 2014) ("The presence of a

constitutional claim does not take a court's review outside of the APA [action].").

1. The challenged action is "committed to agency discretion by law."

As the Supreme Court has explained, the Executive's "broad discretion" in enforcement decisions is "particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). The reasons for judicial modesty in this sphere "are greatly magnified in the deportation context." *AADC*, 525 U.S. at 490. As district courts in Florida and Arizona explained in rejecting two other recent challenges to DHS's immigration enforcement priorities, immigration enforcement prioritization is committed to agency discretion by law and not reviewable under the APA. *See Florida*, 2021 WL 1985058, at *10; *Arizona*, 2021 WL 2787930, at *11.

Plaintiffs' challenge to the New Guidance therefore fails. The APA precludes review "of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" *Texas*, 809 F.3d at 165 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)); *see* 5 U.S.C. § 701(a)(2). One such category which has long been recognized as unreviewable includes enforcement and nonenforcement decisions. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Wayte*, 470 U.S. at 607. That is because, as the Supreme Court has explained, such decisions inherently require "a complicated balancing of a number of factors which are peculiarly within [the Executive's] expertise," including "whether agency resources are best spent on this violation or another,"

"whether the particular enforcement action requested best fits the agency's overall policies," and "whether the agency has enough resources to undertake the action at all." *Chaney*, 470 U.S. at 831. There can be no doubt that this general presumption of nonreviewability applies. But Plaintiffs' Second Amended Complaint suggests that §§ 1225(b)(2)(A), 1226(c), and 1231(a) displace this presumption by using the word "shall." The argument fails here, as the Fifth Circuit recently explained with regard to §§ 1226(c) and 1231(a).[8]

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[8] As explained above, this Fifth Circuit decision was vacated after the ICE Interim Guidance and Pekoske Memo were rescinded. It is therefore no longer binding as precedent, but it still serves as persuasive authority. *See Melot v. Bergami*, 970 F.3d 596, 599 n.11 (5th Cir. 2020) (finding a "thoughtful [circuit court] opinion" persuasive even though it had been "vacated as moot on rehearing"); *Johansen v. Trico Marine Int'l, Inc.*, No. CV H-07-3767, 2008 WL 11390861, at *8 (S.D. Tex. Aug. 29, 2008) ("the reasoning underlying" a vacated "decision remains persuasive authority."). In another context, a different Fifth Circuit panel recently remarked that the Interim Guidance created a "class-based priority scheme" that would be reviewable under the APA. *See Texas v. Biden*, No. 21-10806, 2021 WL 5882670 at *38 (5th Cir. Dec. 13, 2021). Even if this dicta was binding—it is not—the New Guidance makes no "class-based" immigration enforcement distinction. To the contrary, it requires immigration officers to make *case-by-case* "totality of the facts and circumstances" determinations of whether to take certain civil immigration enforcement and removal actions, and thus, even under the Fifth Circuit's analysis in *Texas*, it guides the exercise of prosecutorial discretion and is presumably unreviewable. *See id.* at *36 (the "executive [is] free to leave the law unenforced in particular instances and at particular moments in time"). The New Guidance discarded the presumed priority framework, which presumably created the "classes" referenced by panel, in favor of a totality analysis for officers to decide whether to take an enforcement action. *See* New Guidance at 4 (rejecting "categorical

The word "shall" does not eliminate immigration officials' discretion. *See Texas* Stay Op., 14 F.4th at 337; *Florida*, 2021 WL 1985058, at *10; *Arizona*, 2021 WL 2787930, at *11. Rather, the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005). Thus, in *Castle Rock*, a statute provided that law enforcement "shall arrest . . . or . . . seek a warrant" for the arrest of any violator of a restraining order, but the Supreme Court rejected the notion this imposed a mandatory duty because to be "a true mandate of police action would require some stronger indication" of legislative intent than the bare "shall." *Id.*

So too here. Nothing provides the "stronger indication" necessary to displace enforcement discretion. Quite the opposite: The statutory and practical context here confirm that none of § 1225(b)(2), § 1226(c), or § 1231(a) impose an enforceable mandate in this context. *See Crane*, 783 F.3d at 247 (explaining in the context of a challenge brought pursuant to § 1225(b)(2), that "the concerns justifying criminal prosecutorial discretion are 'greatly magnified in the deportation context'") (quoting *AADC*, 525 U.S. at 490).[9] Congress constructed a removal system that has

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determination[s]"). Accordingly, under either Fifth Circuit panel's analysis, the New Guidance establishes a framework to make individualized determinations in a manner committed to agency discretion.

[9] A Fifth Circuit panel recently held that, once removal proceedings are initiated, § 1225 requires that DHS detain

as a "principal feature" the "broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. That system gives the Executive the discretion to decide "whether it makes sense to pursue removal at all," *id.*, and allows the Executive "to abandon the endeavor" at "each stage" of the process, *AADC*, 525 U.S. at 483. Consistent with that sweeping grant of discretion, Congress empowered the Secretary to establish "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "issue such instructions" and "perform such other acts as he deems necessary for carrying out his authority" under the INA, 8 U.S.C. § 1103(a)(3).

To underscore the extent of the Executive's enforcement discretion, Congress provided that, generally, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C.

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arriving noncitizens at the border or return them to a contiguous territory, and that in combination with § 1182(d)(5), permits DHS to parole them into the United States case-by-case in certain circumstances. *See Texas v. Biden*, 2021 WL 5882670 at *47. That holding applies only to noncitizens "attempting to enter the United States." *Id.* at *46. Even in the context of noncitizens apprehended at the border, the panel acknowledged that DHS "lacks the resources to detain" this class of noncitizens, *id.* at *48, and thus it stands to reason that DHS certainly lacks the resources to detain the broader class of noncitizens that Plaintiffs believe are covered by the statute in the interior. In any event, this is entirely beside the point given that the New Guidance does not even apply to detention. *See* New Guidance at 1 (applying to apprehension and removal).

§ 1252(g). That provision reflects Congress's desire to "protect[] the Executive's discretion from the courts" in general and from "attempts to impose judicial constraints upon prosecutorial discretion" in particular. *AADC*, 525 U.S. at 485-86, 485 n.9. Together with the Executive's longstanding enforcement prerogative, these statutes unmistakably establish that Congress committed immigration enforcement decisions to the Executive's unreviewable discretion. It is thus unsurprising that "in the quarter century that IIRIRA has been on the books, no court at any level previously has held that sections 1226(c)(1) or 1231(a)(2) eliminate immigration officials' discretion to decide who to arrest or remove." *Texas* Stay Op., 14 F.4th at 338.

As the Fifth Circuit recently discussed, Plaintiffs cannot rely on cases such as *Preap*, *Demore,* and *Guzman Chavez* to support their notion that the use of the word "shall" eliminates prosecutorial discretion. Although those cases use seemingly mandatory language to describe the statutes all are "ones in which detainees subject to enforcement action were seeking their release" from custody and in none of them did the Supreme Court "consider whether the statutes eliminate the government's traditional prerogative to decide who to charge in enforcement proceedings (and thus who ends up being detained)." *Texas* Stay Op., 14 F.4th at 338-39.[10] Indeed, in *Preap*, the Supreme Court

[10] The only mandates in §§ 1226(c) and 1231(a)(2) are that DHS not release from detention certain covered noncitizens in certain circumstances. As explained above, the New Guidance does not govern decisions about detention or release. In any event, longstanding DHS practice of detaining covered noncitizens who

expressly *rejected* the argument that Congress wanted the supposedly mandatory language in § 1226(c) to be "*enforced by courts*" against the government; rather, the Supreme Court explained, that language served only to "exhort[]"—that is, to encourage—"the Secretary to act quickly." 139 S. Ct. at 969 & n.6. Moreover, resource constraints, relations with local authorities, and the fundamental difficulty of determining *ex ante* whether a particular noncitizen's conviction triggers the statutory criteria all make it practically impossible to detain every noncitizen whose detention is directed by §§ 1225(b)(2), 1231(a), or 1226(c).

In sum, Congress vested the Secretary with broad discretion to set immigration enforcement priorities. 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(3). The Secretary has exercised that discretion here to focus agency resources on cases that fall within the priority categories, while permitting other enforcement actions when justified by the facts. This Court lacks jurisdiction to review the establishment of enforcement priorities.

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are taken into custody is consistent with these detention mandates: section 1226(c) mandates that once a covered criminal noncitizen is arrested and detained, and in removal proceedings, DHS may release them "only if" narrow exceptions are met; section 1231(a) provides that "[u]nder no circumstance" shall DHS release certain noncitizens who are detained during the removal period. Section 1225(b)(2) lacks the same truly-mandatory language; a mere "shall" does not displace the Executive's discretion.

2. The Memoranda are not "final agency actions" subject to APA review.

Plaintiffs' challenge fails for yet another reason. Only "final agency action" is subject to judicial review under the APA. 5 U.S.C. § 704. Agency action is "final" only if it both is "the consummation of the agency's decisionmaking process" and also determines "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016). Here, the New Guidance does not determine or alter any individual noncitizen's rights or obligations, nor is it an action "from which legal consequences will flow." *See id*. Indeed, in rejecting Florida's request to preliminarily enjoin the Interim Guidance, the district court in the Middle District of Florida found that the challenged agency's enforcement guidance did not constitute final agency action. *See Florida*, 2021 WL 1985058, at *9.

The New Guidance sets out procedures for and the manner in which ICE will take enforcement actions—some of which may result in later "final agency action" subject to review through the INA. Only those later, final agency actions—*e.g.*, the issuance of a final order of removal—"alter" a noncitizen's "legal rights or obligations" or create "legal consequences." The guidance does not itself change any person's legal status, confer any legal benefits, or have any "legal consequences." It is similar to the prosecutor's policy of focusing on bank robberies—such a policy of course does not make pickpocketing lawful or provide a pickpocket with a defense to avoid prosecution. Indeed, the New Guidance expressly advises that it does not

"create any right or benefit, substantive or procedural, enforceable at law." New Guidance at 7.

To be sure, the New Guidance may have downstream consequences. Perhaps DHS will take enforcement action against one noncitizen it otherwise would not have, and perhaps DHS will defer enforcement action against a different noncitizen it otherwise might not have. But "any such consequences are practical, as opposed to legal, ones." *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016); *see also Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003). And it is only *legal* consequences that establish finality for purposes of the APA. Thus, for example, the decision to initiate an enforcement action is the quintessential example of non-final agency action, notwithstanding that it will have the immediate practical effect of requiring the target to participate in related proceedings, and may later result in a legally binding order or judgment. *See, e.g.*, *Energy Transfer Partners, L.P. v. Fed. Energy Regul. Comm'n*, 567 F.3d 134, 141 (5th Cir. 2009); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241 (1980). The New Guidance here is further removed even from that: it does not itself initiate (or terminate) any proceeding but instead merely sets internal procedures for doing so in discrete cases.

3. Congress has precluded judicial review of these types of decisions.

Consistent with the broad enforcement discretion afforded DHS, Congress enacted "*many* provisions . . . aimed at protecting the Executive's discretion from the

courts." *AADC*, 525 U.S. at 486. Those provisions independently preclude judicial review here.

a. APA challenges to DHS's application of enforcement priorities are precluded from review.

An action cannot proceed under the APA when another statute precludes judicial review. 5 U.S.C. § 701(a)(1). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). A detailed mechanism for review of some claims by some plaintiffs is "strong evidence that Congress intended to preclude [other types of plaintiffs] from obtaining judicial review." *United States v. Fausto*, 484 U.S. 439, 448 (1988).

Congress has set out a detailed statutory review scheme for claims pertaining to the INA. *See* 8 U.S.C. § 1252; *id.* § 1229. That review scheme is the exclusive means of judicial review and precludes statutory claims that do not fall within its parameters. *See, e.g.*, *id.* § 1252(a)(5) ("For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, [those terms] include . . . review pursuant to any other provision of law (statutory or nonstatutory)"). Section 1252(b)(9) channels judicial review of all "decisions and actions leading up to or consequent upon final orders of deportation," including "non-final order[s]," into one proceeding exclusively before a court of appeals. *AADC*, 525 U.S. at 483, 485.

A separate—and even more limited—scheme governs judicial review of expedited removal orders. *See* 8 U.S.C. § 1252(a)(2)(A); *id.* § 1252(e). With respect to removal proceedings under § 1229a, these provisions circumscribe district court jurisdiction over "*any* issue—whether legal or factual—arising from *any* removal-related activity," which "can be reviewed *only* through the [statutorily defined] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029–31 (9th Cir. 2016); *see Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) (similar). That includes "policies-and-practices challenges," *J.E.F.M.*, 837 F.3d at 1035, arising from any "action taken or proceeding brought to remove an alien," 8 U.S.C. § 1252(b)(9), whether or not the challenge is to an actual final order of removal or whether there even is a final order at all, *J.E.F.M.*, 837 F.3d at 1032. Thus, § 1252(b)(9) is an "unmistakable zipper clause" that means "no judicial review in deportation cases unless this section provides judicial review." *AADC*, 525 U.S. at 482-83. And as to expedited removal determinations under § 1225(b)(1), "no court shall have jurisdiction to review" any challenge to "procedures and policies adopted by the [Secretary] to implement the provisions of section 1225(b)(1)," subject to minor exceptions, in the District Court for the District of Columbia. 8 U.S.C. § 1252(a)(2)(A)(iv), (e)(3); *M.M.V. v. Garland*, 1 F.4th 1100, 1109 (D.C. Cir. 2021).

The claims here "arise[] from" "action[s] taken or proceeding[s] brought to remove an alien" under § 1229a, 8 U.S.C. § 1252(b)(9), and "procedures and policies" implementing § 1225(b)(1). 8 U.S.C. § 1252(a)(2)(A)(iv). Plaintiffs challenge what they allege to be DHS's practice regarding (1) the initiation

of either expedited removal proceedings, *id.* § 1225(b)(1), or full removal proceedings "under section 1229a," *id.* § 1225(b)(3)(A); (2) detention of certain noncitizens "pending [a] decision" on removal, *id.* § 1225(b)(3)(B); § 1226(a); and (3) the removal "at any time" of noncitizens with reinstated orders of removal, *id.* § 1231(a)(5). Because § 1252 provides the sole mechanism for review of all "decisions and actions leading up to or consequent upon final orders of deportation," *AADC*, 525 U.S. at 485, and because Plaintiffs cannot invoke § 1252, their claims necessarily fail.

As Justice Scalia explained in *Fausto*, when Congress provides for review by specific plaintiffs, but not by others, the excluded plaintiffs cannot obtain judicial review.[11] 484 U.S. at 448. That is precisely what Congress did here. In *Block*, for example, Congress provided a specific review scheme for "dairy handlers" but said nothing at all about "consumers." 467 U.S. at 346-47. This did not mean that milk consumers could resort to the APA to challenge the agency action; it meant they could not challenge the action at all. *Id.* at 347. Here, by providing a detailed and limited review scheme for noncitizens' claims, Congress has implicitly precluded claims by other persons or entities, including by these plaintiffs, under

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[11] The district court that addressed the Interim Guidance thus erred in its understanding of § 1252's import for claims brought outside its strictures. Rather than making *Block* and *Fausto* "irrelevant," *Texas v. United States*, ___ F. Supp. 3d ___, 2021 WL 3683913 at *20 (S.D. Tex. Aug. 19, 2021), the fact that the INA provides review only for noncitizens confirms that *Fausto* and *Block* are directly on point.

the APA or otherwise. *Cf. Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding that organizational plaintiff could not challenge INS policies "that bear on an alien's right to legalization").

b. Plaintiffs' § 1225 challenge is specifically precluded from review.

Even setting aside the broad preclusion of APA claims under § 701(a)(1) and the Supreme Court's precedents in *Fausto* and *Block*, Congress specifically precluded the challenges Plaintiffs raise here. Plaintiffs contend that the New Guidance violates § 1225(b)(1)'s supposed mandate for the expedited removal of certain noncitizens and the ordinary removal proceedings for other noncitizens. *See* Pls.' Mot. for Prelim. Inj. Relief at 6, ECF No. 7. But Congress has explicitly precluded judicial review of this claim: "[N]o court shall have jurisdiction to review" "procedures and policies adopted by the [Secretary] to implement the provisions of section 1225(b)(1)." 8 U.S.C. § 1252(a)(2)(A), (A)(iv);[12] *see id.* § 1252(b)(9) (precluding all such challenges as those brought here under § 1225(b)).

c. Plaintiffs' § 1226(c) challenge is specifically precluded from review.

In addition, Congress expressly precluded judicial review over the Plaintiffs' § 1226-related claim.

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[12] Section 1252(e) restores jurisdiction in two circumstances, neither of which applies here: a habeas challenge by a noncitizen to their expedited removal order, 8 U.S.C. § 1252(e)(2), and a facial challenge to a regulation or policy implementing § 1225(b)(1) "instituted in the United States District Court for the District of Columbia." *Id.* § 1252(e)(3)(A).

Congress provided that the Secretary's "discretionary judgment regarding the application of this section shall not be subject to review." 8 U.S.C. § 1226(e). Here, the Secretary's determinations under § 1226(c) are discretionary since he may detain a noncitizen under § 1226—under either (a) or (c)—only "pending a decision" on removal. Detention authority is thus contingent on the Secretary's separate, predicate, and discretionary decision to commence removal proceedings in the first instance, by issuing a notice to appear. *See id.* § 1229(a); *Crane*, 783 F.3d at 249; *see also Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021) ("A notice to appear serves as the basis for commencing a grave legal proceeding" and "is like an indictment in a criminal case."). Even crediting a judicially enforceable mandate in § 1226(c) for detention "pending a decision" on removal, it would not disrupt the Executive's "broad" discretion to decide who should face removal proceedings in the first place. *Arizona*, 567 U.S. at 396; *Texas* Stay Op., 14 F.4th at 337.

The policy Plaintiffs challenge here—which does not dictate which noncitizens DHS may detain, but instead simply establishes internal procedures that help DHS target its apprehension and removal resources—is still deeper within the Secretary's discretion. Put otherwise, Congress vested the Secretary with discretion to decide who to pursue for removal in the first instance, 8 U.S.C. § 1229(a), and derivatively whom to take into custody and detain pending removal, *id.* § 1226(a); Congress also vested the Secretary with discretion to set "national immigration enforcement polices and priorities," 6 U.S.C. § 202(5); and Congress also

provided that such detention decisions "shall not be subject to [judicial] review," 8 U.S.C. § 1226(e). The Court therefore lacks jurisdiction to review the Secretary's discretionary decision to structure enforcement priorities as he has here.

To be sure, the Supreme Court has held that this section does not preclude a habeas petitioner from challenging either the constitutionality of the statutory scheme or that his detention is not authorized by that scheme. *Demore v. Kim*, 538 U.S. 510, 517 (2003). That is so because Congress must speak more clearly when it seeks to preclude constitutional claims or habeas review. *Id.* In subsequent cases, a plurality of the Court similarly found jurisdiction over constitutional challenges to the statutory framework or to claims contending that detention was *not* authorized by that framework. *Preap*, 139 S. Ct. at 962 (plurality); *Jennings*, 138 S. Ct. at 841 (plurality). *But see Preap*, 139 S. Ct. at 974-75 (Thomas, J., concurring in part) (finding that § 1226(e) bars even those claims); *Jennings*, 138 S. Ct. at 857 n.6 (Thomas, J., concurring in part) (same). Here, Plaintiffs' APA claims are neither constitutional claims nor habeas claims, nor are they arguing that the Secretary lacks the power to detain certain noncitizens under § 1226(c). The "text of the statute contains no [similar] exception" for APA claims. *Preap*, 139 S. Ct. at 975 (Thomas, J., concurring in part). Because these claims do not implicate the special rules of construction related to constitutional or habeas claims, § 1226(e) precludes review.

d. Plaintiffs' § 1231(a)(5) challenge is likewise specifically precluded.

Section 1231 similarly precludes judicial review of Plaintiffs' challenge based on that section. Plaintiffs contend that § 1231(a)(5) requires DHS to remove *all* noncitizens who have reentered illegally. Setting aside whether that interpretation is correct, *see* Defs.' Mem. of P.&A. in Opp'n to Pls.' Mot. for a Prelim. Inj. at 34-47, ECF No. 33 (explaining why Plaintiffs' statutory interpretation is wrong), Plaintiffs cannot enforce that provision. Congress provided, in no uncertain terms, that "[n]othing in [§ 1231] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States." 8 U.S.C. § 1231(h). Whatever the meaning of § 1231(a)(5), it is not subject to judicial enforcement, by "*any* party." *See* Party, *Black's Law Dictionary* (11th ed. 2019) ("One by or against whom a lawsuit is brought."). Section 1231(h), like its statutory ancestor, "makes clear that Congress intended that *no one* be able to bring suit to enforce" it. *Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th Cir. 1995).

Finally, for similar reasons, Plaintiffs do not come within the relevant zone of interests. An APA plaintiff must show that it is "aggrieved . . . within the meaning of a relevant statute," 5 U.S.C. § 702, meaning the plaintiff "may not sue unless he 'falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint,'" *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011) (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 883 (1990)); *see also Match-E-Be-*

Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012). Whether a plaintiff is within the zone of interests is a question answered "using traditional tools of statutory interpretation" to decide "whether [the plaintiff] falls within the class of plaintiffs Congress has authorized to sue" under the applicable statute. *Lexmark Int'l, Inv. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 (2014). As explained above, Congress was clear that no entity can enforce § 1231, and therefore no entity is within the "zone of interests" of § 1231. *See* 8 U.S.C. § 1231(h); *Hernandez-Avalos*, 50 F.3d at 844.

4. Plaintiffs cannot proceed by asserting claims under the Declaratory Judgment Act.

For each of their claims, Plaintiffs also rely on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. *See* SAC ¶ 58, Prayers for Relief ¶¶ A-C. But "[t]he operation of the Declaratory Judgment Act is procedural only." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 15 (1983). Although the Act "enlarged the range of remedies available in the federal courts," it did not create a cause of action, or a new right, to seek those remedies. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see also Harris Cnty. v. MERSCORP Inc.*, 791 F.3d 545, 552- 53 (5th Cir. 2015). Thus, the Act does not salvage Plaintiffs' claims.

III. At Minimum, the Court Should Grant Defendants' Partial Motion to Dismiss.

At minimum, should this Court not dismiss this entire action, it should dismiss for lack of jurisdiction (1) the claims brought by the Foundation as precluded by the Civil Service Reform Act, and (2) Plaintiffs' claims against the President.

A. The ICE Officers' claims are precluded from judicial review by the Civil Service Reform Act.

Even if this Court finds that any of the plaintiffs have standing, the Civil Service Reform Act (the "CSRA") precludes this Court's jurisdiction over any claims brought by the Foundation. The CSRA review scheme is the exclusive means for redressing federal employment disputes, even when plaintiffs style them as constitutional claims. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 10-15 (2012); *Fausto*, 484 U.S. at 455. The exhaustive scheme of the CSRA covers the entire scope of the federal employment relationship, even beyond personnel actions, and is exclusive for federal employment claims regardless of the nature of available review. *Id.* at 443-44, 448-49 (CSRA precluded jurisdiction even though the particular action at issue could not give rise to either administrative or judicial review).

Here, the allegations brought by the Foundation for purposes of associational standing—that ICE officers risk disciplinary action if they ignore the New Guidance—are substantially the same allegations the district court in *Crane v. Napolitano* dismissed as

precluded by the CSRA. *See* Civ. A. No. 3:12-CV-03247-O, 2013 WL 8211660, at *3 (N.D. Tex. July 31, 2013) (O'Connor, J.).[13] There, the law enforcement plaintiffs asserted that DACA required them to "either comply with federal law and face disciplinary actions, or ignore the requirements of federal law and participate in the administration of an illegal program." *See Crane v. Napolitano* ("Pls.' Brief"), 2012 WL 6633750 (N.D. Tex. Nov. 28, 2012.). The court found that this alleged injury amounted to an employment dispute, and the CSRA barred plaintiffs from raising their challenge in court. *See Crane*, 2013 WL 8211660 at 3 n.3.[14] The same conclusion applies here, notwithstanding Plaintiffs' effort to avoid this jurisdictional bar by bringing employees' claims in the Foundation's name.

As to the Foundation's claim to organizational standing, Plaintiffs similarly cannot evade the limits of the CRSA. By Plaintiffs' own description, the Foundation is serving a function of a union by advising its members concerning the terms of their federal employment. *See* SAC ¶ 46 ("The purposes of the

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[13] In affirming the district court's dismissal, the Fifth Circuit did not address the CSRA because it found that the ICE officers lacked standing. *See Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

[14] Whether there is ultimately Article III judicial review of the Foundation's constitutional claim is of no import; all administrative remedies under the CSRA must be exhausted. *See Fleming v. Spencer*, 718 F. App'x 185, 189 (4th Cir. 2018) (concluding "that the CSRA precludes judicial review of constitutional claims for equitable relief when an employee has failed to exhaust administrative remedies available under the CSRA"). Here, there has been no such showing of pursuing such claims, such as those provided by 5 U.S.C. § 2302(b)(9)(D).

Federal Police Foundation include, *inter alia*, conducting research, *informing federal law enforcement officers about legal and policy issues affecting their work*, and informing the public about federal law enforcement matters.") (emphasis added); *id*. (claiming ICE officers as members). But a federal employee union would not be able to bring this claim in this court. *See American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 940 F.2d 704, 708-709 (D.C. Cir. 1991) (holding that CSRA preempts claim brought by union as well as employees). Rather, collective bargaining procedures are part of the CSRA's comprehensive scheme. *See Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 533-34 (1989) (holding Congress created an exclusive scheme to address unfair labor practice claims); *accord Leal v. Woodley & McGillivary*, No. H-08-cv-345, 2009 WL 1704311 at *3 (S.D. Tex. June 17, 2009). The CSRA provides "a dispute-resolution mechanism for the various foreseeable issues that might arise during the collective bargaining process or as part of a final collective bargaining agreement." *Nat'l Ass'n of Agric. Emps. v. Trump*, 462 F. Supp. 3d 572, 576, (D. Md. May 21, 2020) (citing 5 U.S.C. §§ 7104-5, 7116, 7118-19, 7121-22, 7132). Indeed "[a]dministrative review is provided by the Federal Labor Relations Authority (FLRA), a three-member agency charged with adjudicating federal labor disputes, including 'negotiability' disputes and 'unfair labor practice' disputes." *Am. Fed'n of Gov't Emps. AFL-CIO v. Trump*, 929 F.3d 748, 752 (D.C. Cir. 2019) (quoting 5 U.S.C. § 7105(a)); *accord Nat'l Ass'n of Immigr. Judges v. McHenry*, 477 F. Supp. 3d 466, 472 (E.D. Va. 2020), *appeal filed*, No. 20-1868 (4th Cir. Aug. 12, 2020); *see also* 5 U.S.C. § 7121 (collective

bargaining grievance procedures). Thus, as with employees' claims, the CSRA provides the sole remedy for disputes between a union and its members' employer.

It stands to reason that an association advising its members concerning their federal employment can have no more right to review in this Court than would the members' formal, recognized union. Rather, as explained above, the CSRA's comprehensive and exhaustive scheme covers the entire federal employment relationship. *See Fausto*, 484 U.S. at 445 (the CSRA "replaced the [previous] patchwork system with an integrated scheme of administrative and judicial review, Accordingly, regardless of whether the Foundation establishes associational or organizational standing, its claims are precluded by the CSRA.

B. The Court may not enjoin the President in his official duties.

Whatever claims Plaintiffs may have against the other federal defendants, neither injunctive nor declaratory relief is proper against the President in his official capacity. "With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief." *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010); *see Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992) ("[I]n general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)); *Swan v. Clinton*, 100 F.3d 973, 976 n.1, 978 (D.C. Cir. 1996) (courts lack the authority to enjoin the President in the performance of his official

duties and "similar considerations" restrict a court's power to issue a declaratory judgment against the President); *Foley v. Biden*, No. 21-cv-01098 (N.D. Tex. Oct. 6, 2021), Order on Prelim. Inj. at 3, ECF No. 18 ("Thus, the Court cannot remedy Plaintiff's alleged injury because the Court has no declaratory or injunctive power against President Biden."). An "apparently unbroken historical tradition supports the view, . . . implicit in the separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested . . . may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary." *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part) ("For similar reasons," courts "cannot issue a declaratory judgment against the President.")

The reasons for this rule are "painfully obvious." *Swan*, 100 F.3d at 978. The judiciary ordering a co-equal branch of government to perform specific executive acts "at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers." *Id.*; *accord Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."). The *Mississippi* Court further warned of its lack of "power to enforce its process" to support any injunction against the President. 71 U.S. at 501. The Court concluded that an attempt by the judiciary "to enforce the performance

of [executive and political] duties by the President [is] . . . an absurd and excessive extravagance." *Id*. at 499.

Even if the Constitution permitted Plaintiffs to seek relief against the President, Plaintiffs would still need to identify a relevant waiver of sovereign immunity. Plaintiffs cannot rely on the APA, *see* 5 U.S.C. § 702, as "the President's actions [are] not reviewable under the APA, because the President is not an 'agency' within the meaning of the APA," *Dalton v. Specter*, 511 U.S. 462, 469 (1994) (citing *Franklin*, 505 U.S. at 801). Plaintiffs identify no other waiver, and the claims against the President must be dismissed. *Alexander v. Trump*, 753 F. App'x 201, 206 (5th Cir. 2018), *cert denied*, 139 S. Ct. 1200 (2019).

CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' Second Amended Complaint.

Dated: December 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on December 15, 2021.

/s/ Brian Rosen-Shaud
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CERTIFICATE OF CONFERENCE

I certify that the undersigned conferred with Plaintiffs' counsel in compliance with Rule 6 of the Galveston District Court Rules of Practice and that Plaintiffs did not timely amend their pleading.

/s/ Brian Rosen-Shaud
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APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. 3:21-CV-168

[Filed: February 21, 2022]

BRAD COE, *et al.*,	)
	)
Plaintiffs,	)
VS.	)
	)
JOSEPH R. BIDEN, JR., *et al.*,	)
	)
Defendants.	)
	)

ORDER

Before the court is the plaintiffs' motion for a preliminary injunction, Dkt. 7, by which they seek to enjoin the enforcement of two ICE memoranda—one issued on January 20, 2021, the other issued on February 18, 2021. Because this same issue is currently before the Fifth Circuit, *see Texas v. United States*, 14 F.4th 332, 335 (5th Cir.), *vacated*, 24 F.4th 407 (5th Cir. 2021), the court denies the motion without prejudice.

Signed on Galveston Island this 21st day of February, 2022.

/s/ Jeff Brown
JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

Civil Action No. 6:21-cv-00016

[Filed: July 27, 2021]

The STATE OF TEXAS; and the STATE OF LOUISIANA,

Plaintiffs,

v.

The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of The United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S.

Citizenship and Immigration Services, in her official capacity; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES,	)
Defendants.	)

ORDER

The Government[1] has filed a Motion to Consolidate, (Dkt. No. 71), and a Motion to Expedite Briefing on the Motion to Consolidate. (Dkt. No. 72). The Government contends that the Court should consolidate this case with one recently filed in a different division in the Southern District of Texas. *See Coe v. Biden*, No. 3:21-cv-00168 (S.D. Tex. filed July 1, 2021) (Brown, J.). The Government further contends that the Court should stay proceedings in both cases and order status updates until the Parties are able to determine how best to proceed. In support, the Government argues that the claims, requests for injunctive relief, and defendants in both cases are practically identical. (Dkt. No. 71). In addition, the Government argues that consolidation would promote judicial economy and prevent potentially inconsistent judgments. (*Id.*). The Plaintiff States of Texas and Louisiana ("the States") in this case are opposed, (Dkt. No. 74), as are the *Coe*

[1] The Court refers to the Defendants collectively as "the Government" throughout this Order.

plaintiffs. (Dkt. No. 73).[2] Having considered the Motions, the Responses, the record, and the applicable law, the Court **DENIES** the Motion to Consolidate and **DENIES AS MOOT** the Motion to Expedite.

I. BACKGROUND

The States filed this suit in the Victoria Division of the Southern District of Texas on April 6, 2021, seeking to prohibit the Government from implementing and enforcing the January 20 and February 18 Memoranda concerning immigration-enforcement actions. (Dkt. No. 1 at 28); (Dkt. No. 18 at 25, 43). The States further seek to compel the Government to take custody of aliens who have been convicted of certain crimes or are subject to a final order of removal. (*Id.*). In their Complaint, the States assert six claims. The first four involve the Memoranda's alleged noncompliance with the Administrative Procedure Act ("APA"); contrary to law for failure to detain under 8 U.S.C. § 1226(c); contrary to law for failure to detain under 8 U.S.C. § 1231(a)(2); arbitrary and capricious; and failure to follow the notice-and-comment requirements of rulemaking. (Dkt. No. 1 at 21–26). The remaining two claims include a violation of the the Constitution's Take Care Clause and a breach of the purported Agreements between the States and the Government. (*Id.* at 26–27).

On April 27, 2021, the States moved to preliminarily enjoin the Government from

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[2] The Government consented to the *Coe* plaintiffs filing a response to the Motion to Consolidate and Motion to Expedite. (Dkt. No. 71 at n.1).

implementing and enforcing the Memoranda, as well as to compel agency action unlawfully withheld under 5 U.S.C. § 706(1).[3] (Dkt. No. 18). The Government filed a Response in opposition, (Dkt. No. 42), to which the States filed a Reply. (Dkt. No. 51).

On July 1, 2021, well over a month after briefing closed in this case, the *Coe* plaintiffs filed suit in the Galveston Division of the Southern District of Texas. *Coe v. Biden*, No. 3:21-cv-00168 (S.D. Tex. filed July 1, 2021, at Dkt. No. 1). The *Coe* plaintiffs bring claims regarding the February 18 Memorandum. (*Id.*). They assert that the February 18 Memorandum violates: 8 U.S.C. § 1225(b)(2)(A) for failure to detain and initiate removal; 8 U.S.C. § 1226(c) for failure to detain; and 8 U.S.C. § 1231(a) for failure to remove. (*Id.* at 24–26). As for the APA, the *Coe* plaintiffs argue that the February 18 Memorandum: is contrary to law; was promulgated without observance of procedure, including the APA's notice-and-comment requirement; is arbitrary and capricious; and unlawfully withholds and unreasonably delays agency action. (*Id.* at 26–29). Finally, the *Coe* plaintiffs claim that the Government has violated the Take Care Clause of the Constitution. (*Id.* at 30).

For relief, the *Coe* plaintiffs seek a declaration, under various statutes,[4] that the February 18 Memorandum is unlawful. (*Id.* at 31). Next, the *Coe*

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[3] Section 706(1) of the APA provides that a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

[4] These statutes include 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 706(2)(B), 706(2)(D).

plaintiffs seek to enjoin the implementation and enforcement of the February 18 Memorandum. (*Id.*). Third, they ask the court to vacate the February 18 Memorandum. (*Id.*). Finally, the *Coe* plaintiffs seek an injunction compelling the defendants to reinstate detainers, "fully comply with their statutory obligations," take custody of certain criminal aliens, and take custody of certain illegal aliens whose detention or removal is required by law "and who have been arrested by local law enforcement agencies for the commission or state crimes, when such law enforcement agencies seek to transfer custody of such aliens to ICE." (*Id.* at 30–32).

II. LEGAL STANDARD FOR CONSOLIDATION

Rule 42 of the Federal Rules of Civil Procedure permits a court to consolidate cases if the actions "involve a common question of law or fact." Fed. R. Civ. P. 42(a).[5] "Consolidation is a procedural device used to promote judicial efficiency and economy by avoiding unnecessary costs or delay . . . ." *DynaEnergetics Europe GmbH v. Hunting Titan, Inc.*, No. H-17-3784, 2021 WL 3022435, *5 (S.D. Tex. July 15, 2021).

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[5] Rule 42(a) provides:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.

"District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases." *Hall v. Hall*, ___ U.S. ___, ___, 138 S.Ct. 1118, 1131, 200 L.Ed.2d 399 (2018); *accord Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1531 (5th Cir. 1993).

The party moving for consolidation bears the burden of demonstrating that consolidation is proper. *Frazier*, 980 F.2d at 1532. In deciding such motions, courts consider whether (1) the actions were filed in the same court, (2) the actions involve common parties, (3) the actions implicate common questions of law or fact, (4) the risk of prejudice outweighs the risk of inconsistent adjudications, and (5) judicial economy would be affected. *See, e.g.*, *id.* at 1531–32; *Parker v. Hyperdynamics Corp.*, 126 F.Supp.3d 830, 835 (S.D. Tex. 2015).

The Fifth Circuit has urged district courts "to make good use of Rule 42(a) in order to expedite trial and eliminate unnecessary repetition and confusion." *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1013 (5th Cir. 1977) (alteration and quotation omitted); *accord Arnold & Co., LLC v. David K. Young Consulting, LLC*, No. SA-13-CV-00146-DAE, 2013 WL 1411773, *2 (W.D. Tex. Apr. 8, 2013). But even though "consolidation is permitted as a matter of convenience and economy in administration," *Hall*, ___ U.S. at ___, 138 S.Ct. at 1127, "[c]onsolidation is improper if it would prejudice the rights of the parties," *St. Bernard Gen. Hosp., Inc. v. Hosp. Serv. Ass'n of New Orleans, Inc.*, 712 F.2d 978, 989 (5th Cir. 1983).

III. ANALYSIS

The Court now turns to the factors for determining whether consolidation is appropriate. Having considered these factors, as well as the Parties' arguments, the Court finds that the Government has failed to meet its burden of demonstrating that consolidating this case with the *Coe* case is proper.

A. FILED IN THE SAME COURT

The first factor a court considers in determining whether consolidation of cases is appropriate is whether the actions were filed in the same court. Courts have interpreted "same court" as the same district. *See, e.g.*, *Wharton v. U.S. Dep't of Hous. & Urban Dev.*, No. 2:19-CV-300, 2020 WL 6749943, *2 (S.D. Tex. Mar. 3, 2020). But a court still retains broad discretion to consolidate even when cases "are pending in the same district." *Inv'rs Research Co. v. U.S. Dist. Court for Cent. Dist. of California*, 877 F.2d 777 (9th Cir. 1989). Here, the Court notes that this case is pending in the Victoria Division of the Southern District of Texas while the *Coe* case is pending in the Galveston Division before Judge Jeffrey V. Brown, some 170 miles away. Thus, the Court finds that this factor weighs neither in favor of nor against consolidation.

B. COMMON PARTIES

The second factor is whether the two cases involve common parties. The Government argues that this factor weighs in favor of consolidation because this case and the *Coe* case share some common defendants. (Dkt. No. 71 at 6). Although some of the defendants in the

two cases overlap, not all do. Both cases involve the United States, the Secretary of the Department of Homeland Security, the Department of Homeland Security, the Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, the U.S. Customs and Border Protection, the Acting Director of U.S. Immigration and Customs Enforcement, and the U.S. Immigration and Customs Enforcement.

But there are also appreciable differences between the defendants in *Coe* and this case. The President of the United States in his official capacity is a defendant in *Coe* but not here. *Compare* (Dkt. No. 1), *with Coe*, No. 3:21-cv-00168, Dkt. No. 1. Additionally, both the Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services *and* the U.S. Citizenship and Immigration Services are defendants in this case but not in *Coe*. (*Id.*).

Most notably, the two cases have different plaintiffs. Here, the Plaintiffs are States: Louisiana and Texas. (Dkt. No. 1). In *Coe*, the plaintiffs include sheriffs in their official capacities, various counties, and the Federal Police Foundation. *See Coe*, No. 3:21-cv-00168, Dkt. No. 1. The States in this case are also represented by different counsel than the plaintiffs in *Coe*. *See Klick v. Cenikor Found.*, No. 19-CV-01583, 2019 WL 6912704, *1 (S.D. Tex. Dec. 18, 2019) ("Given the disparities in parties and counsel, the differing factual predicates, and the variance in causes of action, the Court finds that consolidation would more likely increase cost and delay, rather than avoid it.").

Considering these key differences, the Court finds that the second factor weighs against consolidation.

C. COMMON QUESTIONS OF LAW AND FACT

The third factor is whether there are common questions of law and fact. The Government believes this factor weighs in its favor, noting both lawsuits challenge the Memoranda on similar grounds. Specifically, the Government asserts that the States and the *Coe* plaintiffs claim that the Memoranda violate various immigration statutes, the APA's procedural and substantive provisions, and the Take Care Clause. (Dkt. No. 71 at 4–5). The States counter by noting that they assert claims that the *Coe* plaintiffs do not, and vice versa. (Dkt. No. 74 at 5). The Court finds that the third factor weighs against consolidation for the following reasons.

In this case, the States challenge only the *detention* of certain aliens who are *presently inside* the United States. (Dkt. No. 1). By contrast, the plaintiffs in *Coe* challenge both the detention *and removal* decisions with respect to certain aliens, which includes those who are *attempting to enter* the United States. *Coe*, No. 3:21-cv-00168, Dkt. No. 1. Detention and removal are distinct areas of immigration law. *Compare* 8 U.S.C. §§ 1226(c), 1231(a)(2), *with* 8 U.S.C. §§ 1231(a)(1)(A), 1231(a)(5). Further, the detention and removal of aliens at different stages of the immigration process implicate different and complex statutes and procedures. *Compare* 8 U.S.C. § 1225, *with* 8 U.S.C. §§ 1226(c), 1231.

In addition to the distinct areas of immigration law, the plaintiffs in each case also raise significant claims not raised by the plaintiffs in the other. In this case, the States assert a claim regarding purported Agreements they made with the Government. (Dkt. No. 1 at ¶¶ 122–25). This claim is not brought by the plaintiffs in *Coe*. Meanwhile, the *Coe* plaintiffs raise a claim under 8 U.S.C. § 1225. *Coe*, No. 3:21-cv-00168, Dkt. No. 1. This claim is not brought by the States here. (Dkt. No. 1).

The cases are also markedly different because the *Coe* plaintiffs and the States seek different relief. Specifically, the *Coe* plaintiffs request the Court to enjoin the implementation or enforcement of only the February 18 Memorandum. *Compare Coe*, No. 3:21-cv-00168, Dkt. No. 1 at 30–32, *with* (Dkt. No. 1). The States, by contrast, seek an injunction as to *both* the February 18 and January 20 Memoranda. (Dkt. No. 1 at 28); (Dkt. No. 18 at 43). Additionally, the *Coe* plaintiffs seek declaratory relief under various statutes, including 28 U.S.C. §§ 2201,[6] 2202,[7] whereas the States do not. *Compare Coe*, No. 3:21-cv-00168,

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[6] Section 2201 provides in relevant part: "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

[7] Section 2202 provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

Dkt. No. 1 at 30–32, *with* (Dkt. No. 1). Finally, the States and the *Coe* plaintiffs request injunctions with differing scopes. In this case, the States request the Court to compel agency action unlawfully withheld. (Dkt. No. 18 at 25). In *Coe*, the plaintiffs request a much broader injunction that reinstates detainers, compels the defendants to "fully comply with their statutory obligations," and requires the defendants to take custody of certain criminal aliens and certain illegal aliens whose detention or removal is required under certain laws "and who have been arrested by local law enforcement agencies for the commission or state crimes, when such law enforcement agencies seek to transfer custody of such aliens to ICE." *Coe*, No. 3:21-cv-00168, Dkt. No. 1 at 31–32.

In light of the many differences in the legal issues implicated, claims raised, and relief sought between this case and *Coe*, the Court concludes the third factor weighs against consolidation.[8]

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[8] The Court notes that the United States did not move to consolidate the recent *Florida* and *Arizona* cases with this case although all three involved similar questions of law and fact brought by the plaintiff States against the Executive Branch. *Compare* (Dkt. No. 1), *with Arizona v. United States*, No. CV-21-00186-PHX-SRB, 2021 WL 2787930 (D. Ariz. June 30, 2021) *and Florida v. United States*, No. 8:21-cv-541-CEH-SPF, 2021 WL 1985058 (M.D. Fla. May 18, 2021). In fact, the *Arizona* and *Florida* cases were filed on February 3 and March 8, 2021, respectively. This case was filed on April 6, 2021. Thus, no more than sixty-two days passed between the filing of the other two lawsuits and this case. Indeed, although *Arizona* focused on removals of certain aliens under 8 U.S.C. § 1231(a)(1)(A)—a statute this Court had previously reviewed in *Texas v. United States*, No. 6:21-CV-00003, 2021 WL 2096669 (S.D. Tex. Feb. 23, 2021)—the claims brought by

D. Risk of Prejudice Versus Risk of Inconsistent Adjudications

The fourth factor weighs the risk of prejudice against the risk of inconsistent adjudication. The Government asserts that consolidation would not prejudice the States because they have requested a preliminary injunction hearing, meaning they have effectively conceded that any delay in adjudication is not an issue. (Dkt. No. 71 at 6–7). The Government also argues that consolidation would eliminate any risk of inconsistent determinations on the legal issues and claims raised in both cases. (*Id.* at 5). The States point to their Motion for Preliminary Injunction, which includes allegations of ongoing irreparable harm, arguing that consolidation would result in further delay and injury. (Dkt. No. 74 at 5). Finally, the States contrast their Motion for Preliminary Injunction, which is ripe, with the motion for preliminary injunction in *Coe*, which is not. (*Id.*). The *Coe* plaintiffs also weigh in, arguing that consolidation would slow proceedings when they, too, are allegedly suffering irreparable

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the plaintiff States in *Arizona* involved similar facts and claims as this case: the January 20 and February 18 Memoranda were contrary to law, arbitrary and capricious, failed to follow notice-and-comment requirements, violated the Take Care Clause, and violated "Memorandums of Understanding" between the plaintiff States and the Executive Branch. *See Arizona*, 2021 WL 1985058, at *3. Similarly, the *Florida* plaintiff State brought claims centered on Sections 1226(c), 1231(a)(1)(A), alleging that the Executive Branch's January 20 and February 18 Memoranda exceeded the Executive Branch's authority and was contrary to law, arbitrary and capricious, violated the Take Care Clause, and the separation-of-powers doctrine. *See Florida*, 2021 WL 1985058, at *4.

harm. (Dkt. No. 73 at 2, 6). The *Coe* plaintiffs argue that there is a low risk of inconsistent adjudications. (*Id.* at 2, 4–5).

Here, the States have the better argument. The risk of prejudice outweighs the risk of inconsistent adjudications. The posture of both cases illustrates why. The instant Motion for Preliminary Injunction is ripe and fully briefed, whereas the pending motion for preliminary injunction in *Coe* is not. Consolidating the cases—and effectively pausing the Court's consideration of the instant Motion to "wait" for further briefing from *Coe*—would thus potentially prejudice the States in this case. This is especially true given that both sets of plaintiffs characterize their injuries as ongoing and irreparable. (Dkt. No. 18 at 8, 16, 19, 40–41); (Dkt. No. 73 at 2, 6); (Dkt. No. 74 at 5). These arguments about irreparable harm comport with one of the preliminary injunction factors: "a substantial threat of irreparable injury." *See Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015).

As stated above, the Government argues that the States "have already accepted" delay in a ruling on their Motion for Preliminary Injunction by indicating interest in a preliminary injunction hearing, so the risk of prejudice to the States is minimal. This argument misses the mark for two reasons. First, the Government exaggerates the "delay" that would result from holding a preliminary injunction hearing. As the Court made clear during the July 2, 2021, status conference, the preliminary injunction hearing would have been expedited and discovery would not have been automatically allowed. Put simply, witnesses who have

not been deposed can still testify at a preliminary injunction hearing–or trial for that matter. Second, any brief delay associated with an expedited preliminary injunction hearing pales in comparison to the delay consolidation would necessarily create. Indeed, consolidation would require additional briefing and add claims, parties, and requests for relief to a case that is already before this Court. The Court therefore finds that the fourth factor weighs against consolidation, as the potential prejudice to both the States and the *Coe* plaintiffs outweighs any risk of inconsistent adjudications.

E. THE EFFECT ON JUDICIAL ECONOMY

The fifth and final factor is the effect of consolidation on judicial economy. The Government posits that consolidation will benefit judicial economy because a "significant majority of the arguments" presented in *Coe* have been fully briefed in this case. (Dkt. No. 71 at 6). The Government suggests that consolidating the cases and ordering supplemental briefing, rather than keeping the two cases separate, would be more efficient. (*Id.*). The States and the *Coe* plaintiffs counter that consolidation would undermine judicial economy because the Court would need to review and rule on two motions because the standing analyses, claims, and requested relief in each case differ. (Dkt. No. 74 at 5). The Court finds the States and *Coe* plaintiffs' arguments more persuasive and concludes that consolidation would not serve judicial economy.

Considerable resources have been devoted to litigating and briefing the Motion for Preliminary

Injunction in this case. Consolidating the cases would squander these resources by forcing the Court and the Parties in this case to effectively start from square one. Given the differences between the cases raised above, the States would likely file, at the very least, supplemental briefing. And with respect to the claims that are similar in both cases, it is not a given that the *Coe* plaintiffs would articulate the same arguments made by the States. This, in turn, would necessitate a response from the Government. The Court would then have to consider these new filings, further delaying a ruling on the States' Motion for Preliminary Injunction.

Consolidation would also undermine judicial economy by combining an already complex case before the Court with another complex case that has a different posture, distinct standing issues, different claims, and unique requests for relief. In short, granting consolidation would not "avoid unnecessary costs or delay." *See St. Bernard Gen. Hosp., Inc.*, 712 F.2d at 989. Therefore, the fifth factor weighs against consolidation.

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Having weighed the five *Frazier* factors, the Court finds that the Government has not carried its burden of demonstrating that consolidation is proper. Therefore, the Court declines the Government's request to consolidate the two cases under Rule 42(a).

IV. CONCLUSION

For the foregoing reasons, the Motion to Consolidate is **DENIED**. Because the Court denies the Motion to

Consolidate, the Motion to Expedite is therefore **DENIED AS MOOT**.

It is SO ORDERED.

Signed on July 26, 2021.

/s/ Drew B. Tipton
DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

APPENDIX K

Oritz, Raul **July 28, 2022**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA

PENSACOLA DIVISION

Case No.
3:21-cv-1066

[Filed: August 26, 2022]

STATE OF FLORIDA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
THE UNITED STATES OF AMERICA, et al.,	)
	)
	)
Defendants.	)
	)

Arlington, Virginia

Thursday, July 28, 2022

Videotaped Deposition of RAUL L. ORTIZ, a witness herein, called for examination by counsel for Plaintiff in the above-entitled matter, pursuant to notice, taken at the offices of Henderson Legal

Services, 2300 Wilson Boulevard, Seventh Floor, Arlington, Virginia, at 9:32 a.m. on Thursday, July 28, 2022, and the proceedings being taken down by stenotype by and transcribed by KAREN YOUNG.

* * *

[p. 171]

A. So it appears that this was part of a tabletop exercise that was executed on that Saturday, and part of the exercise -- the tabletop exercise requires injects to determine what CBP, ICE and the department are going to do if there were to be a mass migration, if Title 42 were to come down and we were to begin to see some increases in flow. So it sounds like Tony is describing to the FEMA exercise operators that that should be a priority, removing those demographics, but this is all I believe centered around a tabletop exercise. This wasn't the operational environment on that particular day.

Q. Okay. Why is it important to detain and remove demographics that are amenable to the Border Patrol?

A. One, you want to make sure you have consequences.

Q. Okay. And if you don't have consequences, what is likely going to happen?

MR. DARROW: Objection.

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

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

MR. DARROW: Objection.

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

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

A. Two or three what?

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

A. Affect the flow?

Q. Yeah.

A. Of course, there's many things. There's, you know, what our partners to the south do, our ability to communicate the dangers, our ability to impact the criminal organizations, smuggling organizations that are trafficking the migrant populations, our ability to deploy technology and manpower in areas where we're starting to see greater flows. All of those factor into the flow and how it's managed.

Q. Okay, and if you're not detaining and removing demographics that are amenable and the flow will compound, so it will increase at an exponential rate? Is that what's being suggested here?

MR. DARROW: Objection.

A. Well, I do think it will increase, yeah.

Q. Now, during the Trump administration, were you able -- we've talked a little today about releasing aliens on their own recognizance. During the Trump administration, were you able to release aliens on their own recognizance?

A. It would have to be on very exigent circumstances.

Q. Some humanitarian reason?

A. Medical or humanitarian reason, yes.

Q. Okay. As far as using parole under the

* * *