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

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO POSTPONE THE EFFECTIVE DATE OF AGENCY ACTION OR, IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

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The Secretary of Homeland Security is responsible for allocating the Department of Homeland Security's limited resources in a manner that best protects the Nation and promotes its values. Consistent with that responsibility and with Congress's charge—and with the historical practice of every prior administration dating back decades—the Secretary has established enforcement priorities to guide his subordinates in carrying out their duties. Texas and Louisiana ask this Court to usurp, for itself, the Secretary's duty and authority, on the meritless claim that this exercise of discretion is lawless. The States' assault on the separation of powers is contrary to law, in this Circuit and elsewhere. Their attempts to distract with cherry-picked anecdotes do not defeat the reasoned lawfulness of the priorities. Likewise, months of Departmental experience operating under the Interim Guidance—backed by data—undermines the States' claims of harm arising from purported, but unproven, inaction relating to immigration enforcement. The relief the States seek would effectively scrap the Secretary's prioritization framework and force local officials again to devise their own patchwork prioritization schemes—potentially *decreasing* immigration enforcement actions directed toward the most dangerous individuals. Consistent with the recent pronouncements by the Fifth Circuit, the relief the States seek is unavailable: the States' claims are unreviewable, meritless, and wholly contrary to the public interest.

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 instituted a revised immigration enforcement priority system. After conducting listening sessions with dozens of groups, the Secretary of Homeland Security issued a new "memorandum [that] provides guidance for the apprehension and removal of noncitizens." *See Guidelines for the Enforcement of Civil Immigration Law* at 1 (Sept. 30, 2021) ("New Guidance"), attached as Exhibit A. 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 individual and the totality of the facts and circumstances," including aggravating and mitigating factors, in determining whether an individual "poses a current threat to public safety." *Id.* at 3. Further, unlike the interim enforcement priorities, there is no supervisory pre-approval requirement for officers to take certain enforcement actions. *Id*. at 5-6.

The States of Texas and Louisiana previously brought suit, arguing that DHS's interim enforcement priorities conflicted with two statutory provisions that, in their view, unconditionally require the arrest and detention of entire classes of noncitizens. This Court granted a preliminary injunction, which the Fifth Circuit stayed in large part. The States now renew their arguments and ask the Court to enjoin the New Guidance.

In its stay decision, the Fifth Circuit concluded that the United States was likely to prevail on appeal in establishing that decisions about "who should be subject to arrest, detainers, and removal proceedings" are committed to agency discretion by law and that the two statutory provisions the States rely on do not displace that discretion. *Texas v. United States*, 14 F.4th 332, 340 (5th Cir. 2021) ("*Texas* Stay Op."). Although the Fifth Circuit concluded, consistent with DHS's longstanding practice, that the statutory provisions likely require DHS to continue detaining certain noncitizens in the Department's custody, the issue of detention is not implicated by the New Guidance, which addresses only apprehension and removal. The States' only response to the Fifth Circuit's decision is to tell this Court that it is not bound by the published Court of Appeals decision. But, unlike a merits panel of the Court of Appeals, *see Tex. Democratic Party v. Abbott*, 978 F.3d 168, 176 (5th Cir. 2020), this Court *is* bound by the Fifth Circuit's decision: "the published opinion granting the stay is this court's last statement on the matter and, like all published opinions, binds the district courts in this circuit." *ODonnell v. Salgado*, 913 F.3d 479, 482 (5th Cir. 2019). The Fifth Circuit found that the States could not show a likelihood of success on the merits in challenging the interim enforcement priorities and that the balancing of equities favored DHS in staying this Court's preliminary injunction. The same applies to the States' challenge to the New Guidance.

Even if this Court were not bound by the Fifth Circuit's determination that the United States is likely to prevail on the merits, it is at the least heavily persuasive authority. Regardless, the States have not demonstrated that they are likely to prevail on the merits. The States fail to engage with the Supreme Court precedent on prosecutorial discretion, including, most importantly, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), which was at the heart of this Court's statutory analysis, *Texas v. United States*, ___F. Supp. 3d___, 2021 WL 3683913, at *30-*34 (S.D. Tex. Aug. 19, 2021) ("*Texas* D. Ct. Op."), and that of the Court of Appeals, *Texas* Stay Op., 14 F.4th at 340-41. At bottom, the States ask this Court to issue an injunction based on an extraordinary interpretation of the Immigration and Nationality Act ("INA"), which no other court has endorsed and which would mean that every administration has violated those provisions since their enactment in 1996. The Court should deny the motion.

BACKGROUND

I. Statutory Framework

The INA establishes the framework for arresting, detaining, and removing noncitizens who are unlawfully present in or otherwise removable from the United States. A "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012).[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)(1); 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 both to initiate proceedings and to choose which charges of removability to pursue, *see* 8 U.S.C. § 1229a(a)(2), and an immigration judge ultimately determines whether the noncitizen is removable on those 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 such a removal order may file an appeal before the Board of Immigration Appeals

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

("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)(1)(B)(ii). "At each stage" of this removal process, "the Executive has discretion to abandon the endeavor." *Reno v. American-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 483 (1999).

This case concerns 8 U.S.C. §§ 1226 and 1231. For both §§ 1226 and 1231, the Fifth Circuit explained that they "do not eliminate immigration officials' 'broad discretion' to decide who should face enforcement action in the first place." *Texas* Stay Op., 14 F.4th at 337 (quoting *Arizona*, 567 U.S. at 396). Rather, they "address a separate question: the custodial status of individuals who are facing removal proceedings [*i.e.*, § 1226] or who have been [ordered] removed [*i.e.*, § 1231]." *Id*.

Thus, § 1226 sets forth the framework for "arresting and detaining" noncitizens present in the United States once removal proceedings have commenced. *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226 "distinguishes between two different categories of aliens." *Id.* Section 1226(a) applies generally to all removable noncitizens and allows the government "to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 846. 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).[2]

Once a removal order becomes final, § 1231(a) sets out DHS's detention authority. 8 U.S.C. § 1231(a). Section 1231 sets a "removal period" of 90 days that begins when the removal

[2] This provision also states that DHS "may release [these] alien[s]" in circumstances not relevant here. 8 U.S.C. § 1226(c)(2). The States are not claiming that noncitizens apprehended under § 1226(c) would be released due to DHS's New Guidance, which does not even address detention, and so § 1226(c)(2) is not implicated in this case.

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. *Id.* §1231 (a)(1)(B)(i)-(iii). Section 1231(a)(2) authorizes detention during the removal period and mandates it for noncitizens removable on certain criminal and terrorism-related grounds. *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 expiration of the removal period. *Id.*; *see* 8 U.S.C. § 1231(a)(1)(C), (a)(6); *but see Zadvyadas*, 533 U.S. at 682 ("Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."). Generally, beyond the removal period, noncitizens with final orders of removal may be released on an order of supervision. 8 U.S.C. § 1231(a)(3).

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 Nov. 12, 2021) ("ICE Policy No. 10074.2"), attached as Exhibit B. Since April 2, 2017, ICE detainers must now 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. Interim Guidance on 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) (the "Pekoske Memo"), AR DHSP_00000065, attached as Exhibit C. 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.* This Court preliminarily enjoined this second measure, which has 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) (the "Interim Guidance"), AR_DHSP_00000070, attached as Exhibit D. The 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 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, such as border security. For example, "[b]etween February 18 and August 31, 2021 ICE arrested 6,046 individuals with aggravated felony convictions compared to just 3,575 in the same period in 2020." *See* Memorandum Regarding Conclusions Drawn from "AART" Data (Sept. 24, 2021) ("AART Data Memo"), AR DHSP_00000108, attached as Exhibit E. Likewise, "field offices became more liberal in authorizing [other priority] cases"—"sexual assault and other sex offenses; DUIs; and assault, particularly domestic violence"—"as time [went] by." *Id*. In fact, the approval rate exceeded 90%, with "requests to pursue an action against a noncitizen with a conviction for a sex offense [] approved at a rate greater than 99%." *Id*. at 3. Meanwhile, border security cases increased as "ICE has surged personnel to support southwest border operations." *Id*. at 2; *see also* Declaration of Peter B. Berg ¶ 18 ("Berg Decl."), AR DHSP_00006035, attached as Exhibit F (identifying approximately 300 ICE officers "detailed to the Southwest Border to support CBP operations.").

B. Litigation on Interim Guidance

Four lawsuits have been brought to challenge the Interim Guidance. In this Court, Texas and Louisiana brought a motion seeking to preliminary enjoin the interim guidance. This 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 this 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). Consistent with longstanding DHS practice, that means DHS will not 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). *See Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law* at 18-19, (Sept. 30, 2021) ("Considerations Memo"), AR DHSP_00000018-AR DHSP_00000019, attached as Exhibit G (explaining history and interpretation of statutory mandates).

The Fifth Circuit also found that the balance of the equities favored substantially staying the preliminary injunction while also expressing skepticism towards nationwide injunctions. Emphasizing that "prosecutorial discretion is a core power of the Executive Branch," the Fifth Circuit explained that "its impairment undermines the separation of powers." *Texas* Stay Op. at 340; *id.* at 341 ("The injury to the executive's daily exercise of this historic discretion is irreparable in the basic sense of the word; there is no way to recover the time when its exercise of discretion is being enjoined during the pendency of the appeal."). Further, the Fifth Circuit observed, "in recent years the Supreme Court has repeatedly stayed nationwide injunctions that prevented the Executive Branch from pursuing its immigration policies." *Id*. Finally, the Fifth Circuit concluded, "eliminating DHS's ability to prioritize removals poses a number of practical problems given its limited resources." *Id*. The States have petitioned the Fifth Circuit to rehear the stay decision en banc.

Three other suits also sought to preliminarily enjoin the Interim Guidance. In none has such relief been granted. 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 is fully submitted to the Eleventh Circuit after briefing and argument. 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).[3] 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. Sept. 3, 2021). Finally, several Texas sheriffs and counties, as well as a federation claiming ICE officers as members, have brought (1) a preliminary injunction motion in this District on the Interim Guidance; and (2) an amended complaint that also challenges the New Guidance. *See Coe v. Biden*, No. 3:21-cv-00168 (S.D. Tex.). That court has not yet ruled on the preliminary injunction motion.

[3] Both the Florida and Arizona district courts found the states in those cases had sufficiently established standing at the preliminary injunction stage.

III. The Secretary's New Guidance of September 30, 2021

On September 30, 2021, the Secretary issued the memorandum at issue here, "Guidelines for the Enforcement of Civil Immigration Law." *See* New Guidance. The seven-part "memorandum provides guidance for the apprehension and removal of noncitizens." *Id*. at 1. 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 sets November 29, 2021, as the effective date, which will also serve 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, public safety, and border security—but the New Guidance functions in a distinctively different manner. *See id*. at 3-4. Rather than creating presumed priority categories or retaining the Interim Guidance's pre-approval process, the New Guidance avoids "bright lines or categories" and instead "requires an assessment of the individual and totality of the facts and circumstance." *Id*. at 3. With this as the backdrop, the New Guidance then includes a non-exclusive list of aggravating (*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*. Leaving discretion ultimately to line officers, the New Guidance emphasizes 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 should evaluate the totality of the facts and circumstances and exercise their judgment accordingly." *Id*.

In developing the New Guidance, the Secretary and DHS received input from a wide range of individuals and groups. *See* Administrative Record Index (ECF No. 117-2), attached as Exhibit H. In particular, the "Department officials engaged in multiple discussions with leadership from ICE, USCIS, and CBP, as well as ICE personnel in the multiple field locations;" and "with external stakeholders, including law enforcement groups, state and local government representatives, and non-governmental entities, including immigrant advocacy organizations." *See* Considerations Memo at 10; *see also* Memorandum regarding Stakeholder Outreach in Furtherance of Department Civil Immigration Enforcement Guidance (Sept. 17, 2021), AR DHSP_00000090, attached as Exhibit I (identifying approximately 30 groups, including the National Sheriffs' Association and the Southwest Border Sheriffs' Coalition, and noting the Secretary's personal engagement with ICE personnel; ICE Field Office Directors, Special Agents in Charge, and Assistant Directors; members of the academic community; immigrant advocacy organizations; and domestic violence advocates and specialists); Memorandum from Cammilla Wamsley, Principal Policy Advisor, Listening Sessions for Final Priorities, AR DHSP_00000095, attached as Exhibit J (Field Office Directors and Special Agents in Charge); Memorandum regarding DHS Enforcement Priorities Stakeholder Outreach April 6-9, 2021, AR DHSP_00000097, attached as Exhibit K (Local Government and Law Enforcement Groups); Memorandum regarding DHS Enforcement Priorities Stakeholder Outreach April 14-May 20, 2021, AR DHSP_00000102, attached as Exhibit L (Governmental and Non-Governmental Organizations). "These conversations helped the Department evaluate its interim immigration enforcement and removal priorities and properly understand and consider the various interests of both internal and external stakeholders, thereby ensuring that the Department's development of new priorities was informed by all of the relevant evidence and interests." *See* Considerations Memo at 10.

Further, DHS summarized the key aspects informing the Secretary's guidance. *See id.* Besides emphasizing the various inputs the Secretary and the Department received from "internal and external stakeholders," the experiences in "the implementation of the" Interim Guidance, and "the Secretary's own experience," DHS also addressed other key "considerations informing the guidelines." *Id*. at 2. In doing so, DHS explained the role of prosecutorial and enforcement discretion in the immigration context (including its history and resource limitations necessitating enforcement discretion), *id*. at 2-8; the current Administration's approach to immigration-enforcement priorities (including the Interim Guidance, the litigation challenging that guidance, and the listening sessions both to evaluate that Interim Guidance and to develop the New Guidance), *id*. at 8-11; and the key considerations underscoring the New Guidance (including public safety, deconfliction, impact on states, resources, statutory mandates, and alternative approaches), *id*. at 11-21. Although the entire Administrative Record was not ready at the time, Defendants served the States this memorandum, which is included in the Administrative Record, on October 19, 2021, to help streamline the briefing. Defendants served the States the full Administrative Record on November 4, 2021.[4]

On October 22, 2021, Texas and Louisiana amended their complaint to challenge the Secretary's New Guidance, and brought the instant motion to delay its effective date and/or to preliminarily enjoin it from being implemented. *See* Am. Compl. (ECF No. 109); Pls.' Mot. to Postpone (ECF No. 111) ("Pls.' Mem."). In their motion, the States bring five claims: (a) a statutory claim pursuant to 8 U.S.C. § 1226; (b) a statutory claim pursuant to 8 U.S.C. § 1231; (c); an arbitrary and capricious claim; (d) a notice-and-comment claim; and (e) a Take Care Clause claim. *See id*. at 23-41. They brought these same five claims in their challenge to the Interim Guidance for which the Fifth Circuit substantially stayed the preliminary injunction. *See* Pls.' Mot. for a Prelim. Inj., 12-26 (ECF No. 18) ("PI Mot.").

[4] Due to technical difficulties, Plaintiffs' counsel were not able to download the Administrative Record until November 5, 2021.

ARGUMENT

To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that a balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "[A] preliminary injunction is 'an extraordinary remedy' which should only be granted if the party seeking the injunction has 'clearly carried the burden of persuasion' on all four requirements." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). In this case, all four factors weigh heavily in Defendants' favor and this Court should deny the States' motion.

"The standard . . . for a stay under section 705 of the APA" is "the same" as the standard for "obtain[ing] a preliminary injunction." *Cook Cnty. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020), *cert. dismissed sub nom. Mayorkas v. Cook Cnty.*, 141 S. Ct. 1292 (2021); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, No. 1:18-CV-00295-LY, 2021 WL 4132272, at *12 (W.D. Tex. Aug. 31, 2021) (noting that the Fifth Circuit "appl[ies] standards for stay pending appeal to request[s] for stay of agency action under § 705 of the APA"). For such a stay under § 705, a court may, however, only issue such a stay "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705. Again, the four factors strongly favor denying a stay but, regardless, the States cannot show such a stay is "necessary to prevent irreparable injury."

I. The States Have Not Demonstrated A Likelihood Of Success On The Merits.

The States cannot establish a likelihood of success on the merits. As an initial matter, they lack standing and, correspondingly, cannot show irreparable harm. But even if the States could establish standing, their claims are without merit. They fail to clear several APA threshold arguments and, regardless, cannot prevail even if they were to overcome those fatal limitations. Given that the States cannot show a likelihood of success on the merits, this Court should deny the States' motion on that basis alone.

A. Texas and Louisiana cannot establish standing, let alone irreparable harm.

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. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "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 and citation omitted). "[W]hen the plaintiff is not [itself] the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). 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).

As an initial matter, the States cannot show that a stay of the effective date of the New Guidance—and the preservation of the Interim Guidance—will redress any alleged injury inflicted on Plaintiffs. The interim enforcement guidance is now in effect, which the States contend injure them. *See* PI Mot., 28-30 (arguing that the interim priorities would increase costs relating to "detention," "public education," and "health care"). Deferring implementation of the New Guidance would prolong this interim guidance and the States have not made any showing why they need the interim guidance to remain in place to prevent any injury. Indeed, there is no reason to assume that the New Guidance is *more* likely to result in the alleged harms identified by the States. The New Guidance calls "for a context-specific" analysis "to assess whether a noncitizen poses a current threat to public safety, including through a meaningful risk of recidivism." *See* Considerations Memo at 12. Accordingly, the States have failed to establish that there is a "substantial likelihood" that an Order preserving the Interim Guidance at the expense of the New

Guidance will "remedy the alleged injury" inflicted upon the States.[5] *El Paso Cnty. v. Trump*, 982 F.3d 332, 341 (5th Cir. 2020). Relatedly, and for the same reason, Plaintiffs cannot show that a stay of the New Guidance is "necessary to prevent irreparable injury," as necessary for § 705 relief. 5 U.S.C. § 705.

In any event, the States fail to establish that the New Guidance will inflict any injury upon the States at all and, thus, the States' preliminary injunction motion likewise fails. Their injury theories again rely on a speculative chain of events: the New Guidance will result in a net decrease in enforcement actions against noncitizens covered by §§ 1226(c) and 1231(a)(2), and those precise noncitizens who will be spared from enforcement actions will either commit crimes or use public education and health resources in the Plaintiff States. *See* Pls.' Mem. 41-43. The States' theories again pile one layer of speculation onto another, and thus fall short of establishing standing. Even accepting this Court's previous finding of standing, which is the subject of appeal, the States are unable to establish that the New Guidance, with its changes from the Interim Guidance, would itself cause them injury.

The States' principal theory is that the New Guidance will increase crime in their States, resulting in an increase in associated costs. 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." 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, the States' theory hinges on the unsupported allegation that the noncitizens spared

[5] To be sure, the States cannot even show that there is a "substantial likelihood" that an Order resulting in DHS abandoning both the New Guidance and the Interim Guidance would redress their alleged injuries. Due to resource constraints, *every* Administration must prioritize certain enforcement actions over others; the only question is *how* it prioritizes. *See Arizona v. United States*, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials . . . must decide whether it makes sense to pursue removal at all" based on the "equities of an individual case."). The States make no attempt to show that, if the Court enjoins the New Guidance, and DHS does not revert to the Interim Guidance, the resulting prioritization scheme would result in a decrease in crime levels within their States, or a decrease in the number of noncitizens who use health care or education resources at the States' expense.

from enforcement actions due to the New Guidance will not only commit crimes but will commit crimes that require *more* resources than those who are apprehended as priorities under the New Guidance but who would not otherwise have been apprehended. *See* New Guidance at 8-9. Relevant data, however, instead suggests that focusing resources through a prioritization framework will enable DHS to take action against a greater number of public safety threats. For example, while the Interim Guidance was in effect, it resulted in *more* arrests of noncitizens convicted of aggravated felonies. *See* Considerations Memo at 17 (from February 18 to August 21, 2021, "ICE . . . arrested 6,046 individuals with [aggravated felony] convictions compared to just 3,575 in the same period in 2020"); Berg Decl. ¶¶ 15-16.[6] Likewise, in light of the Interim Guidance, ICE was able to divert resources to assist with border security. *See id*. ¶ 18 (noting that ICE "detailed" approximately 300 ICE officers "to the Southwest Border to support CBP operations").

To support their theory, the States rely on the Court's order granting a preliminary injunction against the interim enforcement priorities. Pls.' Mem. 41-42 (citing *Texas* D. Ct. Op., 2021 WL 3683913). But that decision did not account for new data (showing that prioritization increases enforcement against dangerous noncitizens), nor does it account for important differences between the New Guidance and Interim Guidance (the New Guidance calls for enforcement action against public safety threats in general). The States also, in passing, invoke a *parens patriae* theory, *see id.* at 42-43, but states cannot bring a *parens patriae* action against the federal government.[7] *See Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)

[6] 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 equally divided court*, 136 S. Ct. 2271 (2016). Here, the offsetting "benefits"—the apprehension, due to the New Guidance prioritization scheme, of certain noncitizens likely to pose a threat to society—is "of the same type" as Plaintiffs' alleged injury—the non-apprehension of other noncitizens who may commit crimes—and arise from the same event (the New Guidance).

[7] The States argue that they are not precluded from bringing such a claim under *Mellon* because they are purportedly "asserting rights under federal law rather than attempting to protect [their] citizens from the operation of federal statutes." *See* Pls.' Mem. 42-43. But in trying to establish standing based on injuries to

("[I]t is no part of" a State's "duty or power to enforce" its citizens' "rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*."). In any event, even if that claim were available against the federal government, it would still fail here because it is premised on the faulty suggestion that the New Guidance is a threat to public safety.

The States' injury theories regarding health care and education costs suffer from similar defects. *See* Pls.' Mem. 41-43. Namely, they again rely on an unsupported assertion that those who will be spared from enforcement actions will choose to utilize public health care and education resources to a degree greater than those who would otherwise have remained in Texas and Louisiana and utilized their resources, but for the New Guidance. To the contrary, according to the States, the amount Texas spent to "educat[e] unaccompanied [noncitizen] children" increased from FY 2019 to FY 2020 (jumping from $42.73 million to $112.10 million), but dropped to $26.71 million in FY 2021 (when the Interim Guidance was in effect). *Id.* at 19. Furthermore, the States assert that Texas expended a significant amount—hundreds of millions of dollars—on health care for noncitizens from 2007-2019. *See id.* at 20-21. But the States provide no supporting evidence to support their conclusory assertion that these significant costs will increase due to the New Guidance. They make little attempt to show that the specific noncitizens who may be spared from enforcement actions under the New Guidance will, for example, require medical care, will be unable to finance this medical care, and will specifically choose to rely on public health resources as a result—much less that those noncitizens will do so at a higher rate than the noncitizens who

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their citizens, the States are not relying on their "rights" or "interests" under federal law. In *Massachusetts v. EPA*, in response to the Chief Justice's dissent that there is "significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government," *Massachusetts v. EPA*, 549 U.S. 497, 539 (2007) (Roberts, C.J., *dissenting*), the majority responded that a state may bring suit against the federal government when it is "assert[ing] its rights under" federal law, rather than the rights of its citizens, *id*. at 520 n.17. Here, the States' *parens patriae* theory relies on alleged injuries inflicted on their citizens; it does not rely on any concrete injury to the States' legal interests. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 607 (1982) ("The State must express a quasi-sovereign interest").

are removed as a result of the New Guidance.[8] Nor do they make any attempt to address the impact of DHS's focus on border security, in terms of prioritizations but also in its ability to shift more resources to the Southwest Border, such as the approximately 300 ICE officers detailed there. *See* Berg Decl. ¶ 18.

Accordingly, none of the States' injury theories are sufficient to establish standing, much less an irreparable harm sufficient to justify the extraordinarily relief they seek here.

B. The States cannot clear three threshold obstacles to their claims.

"Even the APA—potentially the most versatile tool available to an enterprising state—imposes a number of limitations." *Texas*, 809 F.3d at 161. Three of those limitations each independently bars the States' claims here. First, as the Fifth Circuit just observed in largely staying this Court's injunction, 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). Given the Fifth Circuit's stay decision, this Court need not advance past the first argument.

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. Thus, as the Fifth Circuit just observed, immigration

[8] The States, again citing *Massachusetts v. EPA*, argue that states are entitled to special solicitude in the standing analysis. But *Massachusetts* did not relieve states of their obligation to establish a cognizable injury in fact. *See Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 182 (D.C. Cir. 2019) (noting that, in *Massachusetts v. EPA*, the State was "entitled to 'special solicitude' because" it had "a quasi-sovereign interest in 'preserv[ing] its sovereign territory,'" but it still demonstrated "its own harm to establish an injury-in-fact."). Even in *Texas v. United States*, on which the States rely, the Fifth Circuit found that Texas had shown that "DAPA would have a major effect on the states' fiscs." 809 F.3d at 152.

enforcement priorities are "'committed to agency discretion by law' and not reviewable (for substance or procedure) under the APA." *Texas* Stay Op., 14 F.4th at 336. District courts in Florida and Arizona reached the same conclusion in rejecting two other recent challenges to DHS's immigration enforcement priorities. *See Florida*, 2021 WL 1985058, at *10; *Arizona*, 2021 WL 2787930, at *11.

The States make no attempt to distinguish the Fifth Circuit's stay opinion. Instead, they contend that this Court is free to disregard it. The Court should reject this pernicious invitation. Again, Fifth Circuit law is itself clear on this point: "the published opinion granting the stay is this [circuit] court's last statement on the matter." *ODonnell*, 913 F.3d at 482. True enough that a motions panel decision does not bind a later merits panel, *see, e.g.*, *Trevino v. Davis*, 861 F.3d 545, 548 n.1 (5th Cir. 2017), much as a merits panel does not bind the en banc court. But this has no bearing on a *district court's* obligation to apply circuit precedent in addressing whether the States are likely to succeed on the merits.

The Fifth Circuit's analysis as to the Interim Guidance demonstrates why the States fail once again here in their challenge to the New Guidance. 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, and the States do not dispute, that this general presumption of nonreviewability applies. But the States renew, by reference, their argument that

§§ 1231(a)(2) and 1226(c) displace this presumption by using the word "shall." The argument failed in the Fifth Circuit, and it fails here.

As Defendants have previously explained, and as the Fifth Circuit just reiterated, the word "shall" in §§1231 and 1226 does "not eliminate immigration officials' 'broad discretion' to decide who should face enforcement action in the first place." *Texas* Stay Op., 14 F.4th at 337. Rather, the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory commands." *Castle Rock*, 545 U.S. at 761. 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 neither § 1226(c) nor § 1231(a)(2) impose an enforceable mandate. *See Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015) (explaining that "the concerns justifying criminal prosecutorial discretion are 'greatly magnified in the deportation context'") (quoting *AADC*, 525 U.S. at 490). For one, 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 § 1231(a) or § 1226(c).

Respectfully, and as the Fifth Circuit recognized, this Court erred in two respects in its parsing of Supreme Court precedent on this issue. First, the doctrine set out in (and long predating) *Castle Rock* is not overcome by a statute's "manifest purpose . . . to protect the public or private interests of innocent third parties." *Texas* D. Ct. Op., 2021 WL 3683913, at *31. In *Castle Rock* itself the statute's manifest purpose was the protection of victims of domestic violence. *See Castle Rock*, 545 U.S. at 754; *Texas* Stay Op., 14 F.4th at 339. And the strong tradition of discretion in the police context is "greatly magnified" in the context of immigration enforcement, weighted as

it is with foreign affairs implications. *See Texas* Stay Op., 14 F.4th at 339. Older cases did not implicate prosecutorial discretion at all, and so have no bearing on this case. *See id.* at 340 (discussing *Richbourg Motor Co. v. United States*, 281 U.S. 528 (1930) and *Escoe v. Zerbst*, 295 U.S. 490 (1935)).

Second, in its prior decision this Court erred in its synthesis of Supreme Court and other courts' decisions such as *Nielsen v. Preap*, 139 S. Ct. 954 (2019), *remanded*, *Preap v. McAleenan*, 922 F.3d 1013 (9th Cir. 2019) and *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021). *See Texas* Stay Op., 14 F.4th at 338-39. Those cases arose in a wholly different context—detainees seeking relief, not a party seeking to compel government compliance. To be sure, those cases sometimes described the statutes as "mandatory," but they did not decide, as the issue was not remotely implicated, whether the statutes impose a *judicially enforceable* duty on the Secretary. It is not plausible that, without briefing and without acknowledgment, the Supreme Court silently adjudicated the wholly separate, and constitutionally significant, issue of a court's power to compel the executive to allocate its limited enforcement resources in a particular manner, sweeping aside longstanding doctrines concerning enforcement discretion both in the face of a statute using the word "shall," *see Castle Rock*, 545 U.S. at 748, and in the immigration context, *see AADC*, 525 U.S. at 483*; Arizona*, 567 U.S. at 396.

Indeed, the Supreme Court's holding in *Preap* is inconsistent with an enforceable mandate. There, the Supreme Court held that the authority to detain under § 1226(c) persisted beyond the initial release from state custody. *See* 139 S. Ct. at 969. The Supreme Court *expressly rejected* the argument the States have advanced, and this Court has endorsed, in this litigation: that "evidence that Congress *expects* the Executive to meet a deadline" (that is, § 1226(c)'s "shall . . . upon release" language) means that "Congress wanted the deadline *enforced by courts*." *Id.* at 969 n.6. Thus, while those cases generally say nothing at all about whether a party can compel enforcement under § 1226(c) or § 1231(a)(2), the Supreme Court's statement that comes closest to the issue rejects the idea of judicial enforcement.

Finally, and contrary to the States' assertion, § 701(a)(2)'s application here precludes both their substantive challenges and their notice-and-comment claim. As the Fifth Circuit just explained, actions "committed to agency discretion by law" are "not reviewable (for substance *or procedure*)." *Texas* Stay Op., 14 F.4th at 336 (emphasis added). This follows naturally from the structure of the statute: the States' APA claims, both substantive and procedural, arise under 5 U.S.C. § 704, and are premised on the waiver of sovereign immunity in § 702. But as § 701 provides, § 704—and the rest of 5 U.S.C. chapter 7—no longer "applies" when agency action is committed to agency discretion by law. Because the "establish[ment of] national immigration enforcement priorities," 6 U.S.C. § 202(5), reflected in the New Guidance is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the States have no cause of action, and can point to no valid waiver of sovereign immunity, that would permit them to pursue *any* of their claims, including their notice-and-comment claim. *See generally Texas* Stay Op., 14 F.4th 332.

2. The challenged action is not "final agency action" subject to APA review.

Only "final agency action" is subject to judicial review under the APA. 5 U.S.C. § 704. Like the Interim Guidance, the New Guidance is not "final agency action" because it does not create legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). To be sure, this Court previously found that the Interim Guidance was final agency action. But the New Guidance lacks two features that this Court thought important to that analysis. *Texas* D. Ct. Op., 2021 WL 3683913, at *25. First, there is no preapproval process; second, there is no categorical distinction between "presumed priorities" and "other priorities." Instead, line officers are simply instructed to exercise their discretion guided by the considerations set forth in the New Guidance. And the New Guidance does not apply to detention decisions at all.

In any event, this Court's previous analysis of whether the Interim Guidance create legal rights or obligations was mistaken. The Court conflated the legal correctness of the memorandum with its "finality" for purposes of § 704. Agency guidance that does not create legal rights for, or impose legal obligations on, third parties is nonfinal, even where that guidance provides "instruction[s] to [agency] staff," *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C.

Cir. 2014), or expresses the agency's official "view of what the law requires," *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). So long as the agency retains the discretion to alter or revoke the guidance at will—as DHS and ICE have expressly done here—the guidance is nonfinal notwithstanding any expectation that rank-and-file officers will comply with the guidance while it is in effect. *Cf. The Wilderness Soc'y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) (explaining that a particular guidance document did not create rights or obligations because "the agency's top administrators clearly reserved for themselves unlimited discretion to order and reorder all management priorities," even though adherence was generally "mandatory" for rank-and-file staff).

It is not necessary, and indeed it is error, to assess the merits of an APA challenge in order to answer the threshold question whether the merits are reviewable. Under this Court's prior analysis, many agency actions that are patently not "final" under the APA would be final simply because they reflect the agency's view of applicable law and the agency's intent to act on that view. To take one example, in *Luminant Generation Co. v. EPA*, the Fifth Circuit considered whether EPA's issuing a notice of violation to a company, after over ten years of investigation, was "final" such that it was subject to judicial review. 757 F.3d 439, 442 (5th Cir. 2014). This notice plainly represented EPA's interpretation of the relevant law (the Clean Air Act's notice requirements), and the company thought that interpretation was erroneous. EPA was taking action—issuing the notice of violation, and later filing a civil action—based on that allegedly erroneous interpretation. But the Fifth Circuit held that the notices were not final agency action, in part because the "notice does not itself determine [the company's] rights or obligations, and no legal consequences flow from the issuance of the notice." *Id.* Rather it was the *statute* and related state regulations that "set forth" the company's "rights and obligations." *Id.* Legal consequences would arise only later in the process. To take another example, in *Texas v. Rettig*, the plaintiffs argued that 2013 HHS guidance "obligated the States to" structure their Medicaid programs in ways that the States contended violated the law. 987 F.3d 518, 530 (5th Cir. 2021). But the Fifth Circuit held that the 2013 guidance was not "final agency action" because it "did not create any

new obligations or consequences"; instead, it simply "restated" a "requirement [that] has existed since" 2002. *Id.*

Here, similarly, the New Guidance does not alter any individual's or entity's legal rights or obligations. Even the States do not embrace this Court's previous reasoning that enforcement priorities change the States' legal rights or obligations. *See* Pls.' Mem. 44. No surprise, as Texas and Louisiana have the same legal obligations today to, for example, provide a public education on equal terms to noncitizen children, as they did last year and as they will when the priorities become effective. That is because it is the Constitution, not the New Guidance, that "set[s] forth" the States' "right and obligations" in this regard. Or, in the case of Medicaid payments or other expenses the States allegedly incur, it is other state or federal statutes that require the action.[9]

As to noncitizens released because their removal is not reasonably imminent, it is, again, the statute, not the New Guidance, that creates the right to release. *See Hussein S.M. v. Garland*, No. 21-348, 2021 WL 1986125, at *3 (D. Minn. May 18, 2021) (applying *Zadvydas*). Every noncitizen who is potentially subject to removal or other enforcement action remains potentially subject to that enforcement action both before and after the New Guidance. Certain noncitizens may be less likely, as a practical matter, to be pursued for enforcement, but their legal right to remain in this country is determined by statute and regulation, not the enforcement priorities (which may, after all, be changed at any time).[10] In enjoining the Interim Guidance, this Court erred in concluding that the *practical* consequences of the priorities—such as an increase in expenses under preexisting legal duties—rendered the agency action "final" for purposes of the APA. As in *Luminant Generation* and *Rettig*, such downstream consequences of the priorities do

[9] To be clear, this is a wholly distinct question from whether the New Guidance "causes" the States' expenses for standing purposes. Even if (and Defendants doubt) any expenses, to the extent they exist, can be fairly traced to the challenged conduct, the challenged conduct is not the source of the legal obligation to incur those expenses.

[10] Defendants do not dispute that the New Guidance is the "consummation" of the agency process, thus satisfying the first prong of the *Bennett* test. Defendants do argue, however, that the right to change enforcement policies at any time undermines contention that they create legal rights or obligations.

not create "rights and obligations" sufficient to permit review under the APA, because "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).

The States instead posit that the creation of a "case review process" to seek additional review renders the priorities final. Of course, in this regard, the New Guidance does not even represent the culmination of the agency's decisionmaking process, as it simply directs the creation of such a process without defining its contours. The New Guidance does not define or establish any noncitizen's rights or obligations in that case review process. In any event, such a process is procedural only—a mechanism to seek a subsequent alteration of legal rights or obligations. It is black letter law that such an "intra-agency procedural rule" should not be reviewed "until it has been utilized and resulted in a final agency action." *Peoples Nat. Bank v. Off. of Comptroller of Currency of U.S.*, 362 F.3d 333, 337 (5th Cir. 2004).

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

Consistent with the broad discretion afforded DHS in immigration enforcement, Congress enacted "*many* provisions . . . aimed at protecting the Executive's discretion from the courts." *AADC*, 525 U.S. at 486. Those provisions preclude judicial review in this case.

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 orders of removal. *See* 8 U.S.C. § 1252(a)(2)(A); *id.* § 1252(e). 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.

The claims here "arise[] from" "action[s] taken or proceeding[s] brought to remove an alien." 8 U.S.C. § 1252(b)(9). The States 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 "proceeding[s] under section 1229a," *id.* § 1225(b)(2)(A); (2) detention of certain noncitizens "pending a decision" on removal, *id.* § 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 the States 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. 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 the States, under 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. The States' § 1226(c) challenge is specifically precluded from review.

In addition, Congress expressly precluded judicial review over the States' § 1226 claim. Congress provided that the Secretary's "discretionary judgment regarding 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"). As the Fifth Circuit observed, even crediting a judicially enforceable mandate in § 1226(c), it would not disrupt the Executive's "'broad' discretion to decide who should face enforcement action in the first place." *Texas* Stay Op., 14 F.4th at 337 (quoting *Arizona*, 567 U.S. at 396).

The policy the States challenge here—which does not dictate which noncitizens ICE may detain, but instead simply establishes internal procedures that help ICE target its 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 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 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 immigration 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 v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (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, the States' 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 [related] exception" for APA claims, *Preap*, 139 S. Ct. at 975 (Thomas, J., concurring in part). Because the claims here do not implicate the special rules of construction related to constitutional and habeas claims, § 1226(e) precludes review.

c. The States' § 1231(a)(2) challenge is likewise specifically precluded.

Section 1231 similarly precludes judicial review of the States' challenge based on that section. Congress provided, in no uncertain terms, that "nothing 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). Section 1231 is simply not subject to judicial enforcement, by the States or by "any party." 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) (holding that, under the same zone of interests test applicable to APA actions, a plaintiff could not enforce the statute).

This Court has previously rejected the straightforward and plain meaning of the term "any party" to mean *any* party. *See* PARTY, *Black's Law Dictionary* (11th ed. 2019); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218–19 (2008) (Thomas, J.) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). Instead, the Court, relying on its findings of statutory purpose derived from its reading of legislative history, construed the term to mean only an "alien in a removal proceeding." *Texas* D. Ct. Op., 2021 WL 3683913, at *21 (quoting *Texas v. United States*, No. 6:21-cv-00003, 2021 WL 2096669, at *23-*28 (S.D. Tex. Feb. 23, 2021)). But this reading conflicts with the provision's plain text. The statute is not limited to "parties to removal proceedings." Nor is the Court's reading supported by context. By using the term "any party" in § 1231(h) instead of "the alien," as is used throughout the rest of § 1231, Congress meant something broader than to preclude claims only of noncitizens. *See* 8 U.S.C. § 1101(a)(3) (defining "alien"); *see also Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018). Further, in enacting § 1231(h), the relevant Conference Report noted that the provision "is intended, *among other things*, to prohibit the litigation of claims by aliens who have been ordered removed from the U.S. that they be removed at a particular time or to a particular place." *See Texas* D. Ct. Op., 2021 WL2096669, at *28 (emphasis added) (quoting H.R. Rep. No. 104-828, at 219) (Conf. Rep.) (1996)); *see also Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."). Accordingly, although § 1231(h) certainly does preclude a noncitizen in a removal proceeding from enforcing any provision of § 1231, § 1231(h) is not limited to that scenario. That provision thus applies here to bar the States' claims.

Finally, for similar reasons, the States 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." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (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.

C. The States' APA claims fail on the merits.

1. The New Guidance is not "contrary to law."

Even if the States could pursue their APA claims, they would fail on the merits. The States principally contend that DHS has a non-discretionary duty under §§ 1226(c)(1) and 1231(a)(2) to apprehend all noncitizens who have committed certain criminal offenses or who are subject to final orders of removal. Pls.' Mem. 24-32. In making these arguments, the States do not cite, much less apply, the Fifth Circuit's recent analysis of these provisions. Neither section displaces DHS's traditional prosecutorial discretion to decide which noncitizens to bring enforcement actions against. *Texas* Stay Op., 14 F.4th at 340. The statutes' limited mandate requires DHS to not release certain noncitizens who have already been arrested and taken into custody. *See id.* The New Guidance does not govern detention, so the statutes' limited mandate does not apply. Even if the stay opinion did not preclude the States' argument, the New Guidance would not violate any mandate in those statutes because it simply establishes guidelines for ICE officers to exercise their discretion, and it does not prohibit DHS from taking custody of any noncitizen.

a. The statutory provisions at issue only govern detention requirements.

The States' arguments that the New Guidance is contrary to law fail because §§ 1226(c) and 1231(a)(2) require continued detention only of covered noncitizens already in custody. 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. Longstanding DHS practice of detaining covered noncitizens who are taken into custody are consistent with these detention mandates.[11]

The New Guidance does not implicate these narrow detention mandates, because the New Guidance does not govern decisions related to detention and release. *See* New Guidance at 1. Rather, the "memorandum provides guidance for the apprehension and removal of noncitizens." *Id.* The States' arguments about §§ 1226(c) and 1231(a)(2) are therefore inapposite because the New Guidance does not touch upon detention, the sole action mandated in some circumstances by §§ 1226(c) and 1231(a)(2).

The States' statutory arguments are premised on their view that §§ 1226(c) and 1231(a)(2) require DHS to "take into custody" certain classes of noncitizens. *See* Pls.' Mem. 24, 31. The Fifth Circuit found that the statutes impose no such obligation: nothing in the 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." *Texas* Stay Op., 14 F.4th at 340. The decision to take into custody—that is, to arrest—noncitizens described in §§ 1226(c)(1) and 1231(a)(2) is committed to agency discretion and, therefore, any decision not to take a noncitizen into custody is not a statutory violation. *See id.* The Fifth Circuit analyzed the cases on which the States rely—*Jennings*, *Preap*, and *Demore*—and found that "[t]hose cases do not 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)," because the cases "are ones in which detainees subject to enforcement action were seeking their release." *Id.* at 338-39.[12]

[11] DHS implemented the interim enforcement priorities in a manner consistent with the statutes' narrow detention mandates. *See* Considerations Memo.

[12] Though the States do not rely on the case in their motion, the Fifth Circuit also distinguished *Guzman Chavez*, where "already-removed detainees sought release," on the same grounds. *Texas* Stay Op., 14 F.4th at 338 (citing *Guzman Chavez*, 141 S. Ct. at 2281).

The States suggest that DHS violates the detention requirement of § 1226(c) when it rescinds a detainer that it previously issued for a noncitizen in state custody. *See* Pls.' Mem. 28-30. But issuing a detainer is not the same as arresting a noncitizen and taking them into custody. A detainer is simply an administrative tool of DHS's creation to facilitate its operations. ICE "issues detainers to federal, state, local, and tribal [law enforcement agencies] to provide notice of its intent to assume custody of a removable alien." ICE Policy No. 10074.2. A detainer, then, is a request to local law enforcement to hold a noncitizen so that ICE can arrive to arrest them. *See id.* The cancellation of a detainer does not implicate the detention requirement of § 1226(c), which only attaches after ICE takes the covered noncitizen into custody and removal proceedings are commenced, because a detainer is a pre-arrest decision. This conclusion is consistent with both the text of § 1226(c), *see supra* at 20-21 (explaining that, under *Castle Rock*, § 1226(c) does not mandate that DHS arrest all noncitizens potentially covered by the statute), and the Fifth Circuit's clear statement that the provision does not "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 [and] detainers," *Texas* Stay Op., 14 F.4th at 340.

In sum, the New Guidance does not implicate either § 1226(c) or § 1231(a)(2), because the policy only directs ICE officers' exercise of pre-detention discretion. And the Fifth Circuit was clear: the Executive Branch retains its prosecutorial discretion over decisions before detention, including of arrest and whether to issue or cancel detainers. *Texas* Stay Op., 14 F.4th at 340. The States do not attempt to distinguish the Fifth Circuit's statutory analysis. Nor could they.

b. The New Guidance does not violate § 1226(c).

Of course, even if § 1226(c) did create a duty to take custody of noncitizens, the New Guidance still would not violate it. The New Guidance does not prohibit the arrest or detention of any noncitizen. It merely prioritizes enforcement actions against certain noncitizens based on public safety, border security, and national security considerations. Immigration officers may still arrest and detain any noncitizen they determine to be a worthy use of resources, guided by aggravating and mitigating circumstances. *See* New Guidance. The Supreme Court in *Preap*

recognized that, in § 1226(c), Congress did not expect DHS to immediately arrest all noncitizens covered by that provision. *See* 139 S. Ct. at 969; *see also id*. at 973 (Kavanaugh, J., concurring). Indeed, in *Preap* some plaintiffs were arrested "several years" after they were released from state criminal confinement. *Id.* at 961.

The States protest that the New Guidance prevents DHS from taking custody of noncitizens "convicted of serious crimes" covered by § 1226(c)(1). Pls.' Mem. 28. But, again, the New Guidance emphasizes that "[t]he overriding question is whether the noncitizen poses a current threat to public safety." New Guidance at 4. ICE officers are entrusted to conduct an "assessment of the individual and the totality of the facts and circumstance," including by weighing the non-exclusive list of aggravating (*e.g.*, "the gravity of the conviction and the sentence imposed" or "the sophistication of the criminal offense") and mitigating factors (*e.g.*, "military or other public service" or "time since an offense and evidence of rehabilitation"). *Id*. at 3. The New Guidance expressly permits apprehension of *all* criminal noncitizens—including those described in § 1226(c)(1).[13] Because the New Guidance simply creates a prioritization scheme and does not insulate noncitizens from enforcement actions, the New Guidance is consistent with § 1226(c).

If the States' concern is that ICE is not detaining *every* noncitizen covered by § 1226(c), then their issue is not with the New Guidance but with the very idea of prosecutorial discretion. Resource limitations mean that DHS has *never* been able to arrest all noncitizens and the States do not assert that DHS was accomplishing this insurmountable task before the New Guidance was issued. *Cf. Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 976 (9th Cir. 2017) ("Congress has not appropriated sufficient funds to remove all . . . undocumented aliens."). DHS will inevitably have to prioritize certain noncitizens over others, *see Chaney*, 470 U.S. at 831, and the New Guidance merely informs officers on how to prioritize their enforcement efforts. The States' contrary

[13] In one sentence, the States suggest that Defendants are releasing some noncitizens whose release is prohibited by § 1226(c)(2). Pls.' Mem. 30. But, the New Guidance does not govern detention decisions. Plus, DHS shares the States' view that once noncitizens are arrested and detained under § 1226(c)(1), they generally may not be released from DHS custody. *See* 8 U.S.C. § 1226(c)(2).

position would mandate that DHS detain low- and high-level priorities alike, rendering impossible the Secretary's ability to carry out Congress's charge that he establish national immigration enforcement policies and priorities and jeopardizing DHS's ability to prioritize enforcement actions against noncitizens posing the greatest threat.[14]

Last, the States' passing suggestions about relief under 5 U.S.C. § 706(1) are erroneous. Pls.' Mem. 30, 32. The States have not met their high burden for such a mandatory injunction. *See Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) ("Only in rare instances is the issuance of a mandatory preliminary injunction proper."), *accord Hyde v. Selene Fin. LP*, Civ. A. No. 4:17-cv-00993, 2017 WL 11552846, at *2 (N.D. Tex. Dec. 29, 2017) ("when a plaintiff seeks a preliminary injunction, there is a heavier burden on plaintiff to establish that injunctive relief is appropriate"). A "claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in original). As the Fifth Circuit has affirmed, *Texas* Stay Op., 14 F.4th at 340, DHS retains prosecutorial discretion at every step of the removal process concerning whether to arrest, issue detainers to, or remove any specific noncitizen. *AADC*, 525 U.S. at 483-84. In addition to being contrary to law, a mandatory injunction is particularly inappropriate here because it "would likely require expansion of [ICE's] resources beyond those currently budgeted and allocated by Congress" and is otherwise "unreasonably and unduly burdensome, if not entirely impossible." *See* Declaration of Thomas Decker ¶ 7, ("Decker Decl.") AR DHSP_00005782, attached as Exhibit M.[15]

[14] The States' view that § 1226(c)(1) requires indefinite detention even for noncitizens "who will never face removal proceedings" is at odds with *Jennings*. *See Texas* Stay Op., 14 F.4th at 338 n.5.

[15] To the extent §§ 1226(c)(1) and 1231(a)(2) require some discrete agency action, they do not require DHS to issue detainers in particular. "Filing a detainer is an *informal* procedure in which [DHS] informs prison officials that a person is subject to deportation and requests that officials give [DHS] notice of the person's death, impending release, or transfer to another institution." *Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) (quoting *Giddings v. Chandler*, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992) (emphasis added). Section 1357(d)—the only provision of the INA explicitly mentioning detainers—provides only that in certain circumstances involving noncitizens arrested for controlled substance violations, DHS should

c. The New Guidance does not violate § 1231(a).

The States' claim with respect to § 1231(a)(2) fails for similar reasons. Even if that provision could be read to impose an unconditional command to take custody of all noncitizens with final removal orders, the New Guidance does not prohibit the arrest or detention of any noncitizen, but merely instructs officers to exercise their discretion to focus on the most serious threats to public safety and national security, on a case-by-case basis. *See* New Guidance at 3-4.

The States nevertheless contend that the New Guidance will prevent the arrest and detention of certain noncitizens whose removal period begins "the date the alien is released from [state] detention or confinement," 8 U.S.C. § 1231(a)(1)(B)(iii), and who are covered by § 1231(a)(2). Pls.' Mot 31. The States contend that any such delay contravenes § 1231(a)(2)'s purported mandate of "immediate" detention without "delay," Pls.' Mem. 31-32. But just as with § 1226(c), § 1231(a)(2)'s provision stating that DHS "shall" detain covered aliens as of "the date the alien is released" does not realistically contemplate—and certainly does not command—the *immediate* arrest of all covered noncitizens. *See Preap*, 139 S. Ct. at 969; *see also id*. at 973 (Kavanaugh, J., concurring). The New Guidance directs officers to focus the agency's limited resources to "to most effectively achieve [DHS's] goals," including protecting against "threat[s] to public safety," New Guidance at 3, without prohibiting officers from seeking immediate detention in any case, when justified. *See id.* at 4 ("The overriding question is whether the noncitizen poses a current threat to public safety.").

DHS has thus long understood § 1231(a)(2) to require DHS to detain certain terrorist and criminal noncitizens during the removal period once arrested, and the first sentence to authorize but not require the detention of other noncitizens during the removal period. *See, e.g.*, *Continued*

"promptly determine whether or not to issue such a detainer." *See* 8 U.S.C. § 1357(d). The regulation codifying DHS's detainer authority more broadly—provides only that authorized officers "*may* at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency . . . ." 8 C.F.R. § 287.7(a) (emphasis added); *see also Santoyo v. United States*, Civ. No. 5:16-CV-855-OLG, 2017 WL 6033861, at *3 (W.D. Tex. Oct. 18, 2017) ("The statutory and regulatory authorities that regulate the issuance of ICE detainer requests do not mandate their issuance."), *appeal dismissed*, *Santoyo v. Bexar Cnty.*, 2019 WL 11706155 (5th Cir. Nov. 8, 2021).

Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001). Consistent with that understanding, the Supreme Court has explained that § 1231(a) only "mandates detention of *certain criminal aliens*" during the removal period. *Zadvydas*, 533 U.S. at 698 (emphasis added). Were it otherwise, then DHS would have to detain every noncitizen during the removal period, even if removal ultimately proved impossible. "Removal decisions . . . implicate our relations with foreign powers and require consideration of changing political and economic circumstances." *Jama v. ICE*, 543 U.S. 335, 348 (2005) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Congress thus intended for DHS to retain flexibility to account for the "dynamic nature of relations with other countries," *Arizona*, 567 U.S. at 397, and "to avoid removals that are likely to ruffle diplomatic feathers, or simply to prove futile." *Jama*, 543 U.S. at 348.[16] A corollary of that necessary flexibility is the authority to prioritize which cases DHS will pursue for actual removal, and accordingly those noncitizens that ICE will take into custody and detain pending removal. The New Guidance simply establishes guidelines for ICE officers to use in exercising their discretion; it does not violate any statutory mandate in § 1231.

2. DHS's new enforcement guidance is a reasonable effort to prioritize limited resources in enforcing immigration laws.

The States also cannot establish that the New Guidance is arbitrary and capricious. "The arbitrary and capricious standard is highly deferential." *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 453 (5th Cir. 2015) (quoting *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004)). "[T]he reviewing court must consider whether the decision

[16] To name just two examples: no noncitizen can be removed without procuring travel documents from his or her native country, but many countries refuse to issue such travel documents until a noncitizen's judicial appeals are fully exhausted, which often is years after release from state or local custody. *See, e.g.*, *Adefemi v. Gonzales*, 228 F. App'x 415, 416 (5th Cir. 2007) (per curiam). Even with travel documents, removal may be inappropriate because "[t]he foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return." *Arizona*, 567 U.S. at 396-97. But were the States correct, then DHS must detain such noncitizens even though foreign affairs concerns mean there is "no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Section 1231(a)(2) does not require that perverse result, which would raise serious Constitutional concerns. *Id.* at 699-700; *see also United States v. Vasquez-Benitez*, 919 F.3d 546, 552 (D.C. Cir. 2019).

was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). Here, Defendants reached a reasonable decision based on the relevant factors.

In issuing the New Guidance, the Secretary determined that DHS does not "have the resources to apprehend and seek the removal of every one of [the more than 11 million undocumented or otherwise removable noncitizens in the United States]," and, therefore, emphasized the "need to exercise our discretion and determine whom to prioritize for immigration enforcement action." *See* New Guidance at 2. Indeed, citing two Supreme Court decisions of the last quarter century, the Secretary noted that 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." *Id*. (referring to *Arizona* and *AADC*); *see also Texas* Stay Op., 14 F.4th at 340 (underscoring "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"). Thus, with this backdrop the Secretary concluded that DHS should prioritize those who pose the greatest risk to national security, border security, and public safety. *See* New Guidance at 3-4; *id*. at 2 (recognizing that the majority of noncitizens who could be subject to removal have been contributing members of our communities for years); *see also Arizona*, 567 U.S. at 396 ("Discretion in the enforcement of immigration law embraces immediate human concerns.").

But in articulating who to prioritize, Secretary still ensured that those categories were flexible enough for officers to take the totality of circumstances into consideration in determining those who pose the greatest threats and should be subject to enforcement actions. In particular, the Secretary's New Guidance instructs line officers to make an "assessment of the individual and the totality of the facts and circumstances," based on aggravating and mitigating factors, in determining whether an individual "poses a current threat to public safety." New Guidance at 3. Thus, in this context, officers must "exercise their judgment accordingly," with the understanding that "[t]he decision how to exercise prosecutorial discretion can be complicated and requires

investigative work." *Id*. at 4. Further, while "the guidance leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel," the New Guidance also seeks to "ensure the quality and integrity of [DHS's] civil immigration enforcement actions, and to achieve consistency in the application of our judgments," by relying on training, a review process, data collection, and individual case review. *Id*. at 5-6. This comprehensive, and yet flexible, system, is a reasonable determination of how best to exercise long-recognized enforcement discretion in the immigration context.

The Secretary's memorandum on its face is thus sufficient to survive arbitrary and capricious review. *See*, *e.g.*, *Chaney*, 470 U.S. at 842 (Marshall, J., concurring) ("a decision not to enforce that is based on valid resource-allocation decisions will generally not be arbitrary, [and] capricious") (quoting 5 U.S.C. § 706(2)(A)); *AADC*, 525 U.S. at 490-91 (discussing factors that may go into enforcement decisions). Nevertheless, in a lengthy memorandum summarizing the considerations informing the Secretary's memorandum, Defendants further explained the basis for the New Guidance. *See* Consideration Memo (explaining the various inputs from internal and external groups, the role of prosecutorial and enforcement discretion in the immigration context, the current Administration's approach, and key considerations underscoring the New Guidance—including public safety, deconfliction, impact on states, resources, statutory mandates, and alternative approaches). Thus, the new enforcement priorities must be upheld; DHS "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," including a "rational connection between the facts found and the choice made." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Notwithstanding DHS's comprehensive review, *e.g.*, listening sessions with dozens of groups, and in-depth analysis, the States still argue that the New Guidance is arbitrary and capricious. *See* Pls.' Mem. 32-36. In doing so, the States do not engage with DHS's Considerations Memo that directly contradicts their arguments, even though Defendants provided it to them three days before the States filed their motion. In their Amended Complaint, the States suggest that the

agency's considerations must be included in the operative document. *See* First Am. Compl. ¶ 132 (ECF No. 109) (citing the pre-APA decision of *SEC v. Chenery Corp*., 318 U.S. 80, 87 (1943) that merely states that an agency's action should be judged on the agency's record). That is a misstatement of the law. Rather, under the APA, an agency's actions must generally "stand or fall" on the "propriety of [the agency's] finding" that is "sustainable on the administrative record." *See Camp v. Pitts*, 411 U.S. 138, 143 (1973). In other words, the court considers the entire administrative record. *See, e.g. id*. ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *accord Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). Further, it makes little sense for a document providing operational guidance to include such details, much as the "operative documents" an agency publishes in the Code of Federal Regulations do not include the agency's analysis published separately in the Federal Register.

The arguments the States make in support of their arbitrary and capricious claim are indeed completely undermined by the Consideration Memo. First, the States claim that Defendants did not consider "the risks of recidivism among criminal aliens who are not detained." *See* Pls.' Mem. 33. But the Considerations Memo noted that the New Guidance addresses this concern "by calling for a context-specific consideration of aggravating and mitigating factors, the seriousness of an individual's criminal record, the length of time since the offense, and evidence of rehabilitation," and that "[t]hese factors are to be weighed in each case to assess whether a noncitizen poses a current threat to public safety, including through a meaningful risk of recidivism." *See* Considerations Memo at 12.

Next, the States argue that DHS did not address how non-detention will inhibit removal later. *See* Pls.' Mem. 33-34. Again, the Considerations Memo addressed this issue: "This criticism is based on the misconception that if the Department did not prioritize its enforcement efforts—or if it prioritized enforcement in some different way—a significantly greater number of people could be arrested, detained, moved through removal proceedings, and processed for removal." *See* Considerations Memo at 17. Rather, the agency explained, "[r]esource limitations make that an

impossibility, as has been the case since the Department was formed (and before that as well)," and described how "such an approach ignores the reality that the Department's overall safety and security mission is not best served by simply pursuing the greatest overall number of enforcement actions but is rather best advanced by directing resources to prioritize enforcement against those noncitizens who most threaten the safety and security of the Nation." *Id*.

The States' remaining critiques are similarly belied by the administrative record. The States suggest that Defendants did not consider the impact of the New Guidance on the States, *see* Pls.' Mem. 34-35; that Defendants did not consider any alternative approaches, *id*. at 35; and that Defendants did not provide a statutory basis for what should be considered aggravating and mitigating factors, *id*. at 35-36. But all of these are discussed at length in the Considerations Memo and have their own sections: "*Impact on the States*," *see* Considerations Memo at 14-17; "*Consideration of Alternative Approaches*," *see id*. at 19-21; "*Relationship Between Enforcement Priorities and Statutory Mandates*, *see id*. at 17-19.[17] It may be that the States would disagree with the way the Secretary resolved these issues. But it is not the States'—or the Court's—role to determine policy for the Department of Homeland Security. At bottom, the Secretary expressly considered each factor that the States contend he should have, and concluded that those considerations supported the policy he adopted.

In the end, Defendants engaged in reasoned decision-making and the States' arguments to the contrary should be rejected.

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[17] The States also argue that Defendants have not explained why the new guidelines do not list an "aggravated felonies" in its own right as a priority group. *See* Pls.' Mem. 35-36. But, in the Considerations Memo, Defendants explained that "[i]n the Department's engagements with internal and external stakeholders, including with the ICE workforce, concerns were raised about whether the focus on individuals convicted of 'aggravated felonies' was both over- and under-inclusive." *See* Considerations Memo at 12. Rather, the Department found that "[t]he aggravated felony definition can be challenging to administer in many instances" and it "is an imperfect proxy for severity of offense." *Id*.; *see also id*. ("In designing a new public safety enforcement priority category, the Department considered these concerns and chose to place greater emphasis on the totality of the facts and circumstances that inform whether an individual poses a current threat to public safety—typically because of serious criminal conduct—including by looking at key aggravating factors related to the individual's criminal offense and history as well as various mitigating factors.").

3. DHS's and ICE's internal guidance on enforcement prioritization is exempt from notice and comment.

The New Guidance is likewise exempt from the APA's notice-and-comment requirement. This requirement does not apply to "general statements of policy," 5 U.S.C. § 553(b)(A), which "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln*, 508 U.S. at 197 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)). By contrast, rules that must generally be adopted through notice and comment are those that have the force and effect of law and create legally enforceable rights or obligations. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Here, the New Guidance is quintessentially a policy statement: it announces how and when DHS components will pursue (or forbear from) enforcement—a decision "generally committed to an agency's absolute discretion." *Chaney*, 470 U.S. at 831. But it does not alter the rights or obligations of any person, nor does it create a binding norm on any individual enforcement decision.

Indeed, the Fifth Circuit's stay opinion applies here: the Court cannot review the States' procedural claim. *See, e.g., supra* at 22 (explaining how 5 U.S.C. § 701(a)(2) precludes judicial review of notice-and-comment claims). The logic of *Lincoln* itself underscores how agency guidance on matters committed to agency discretion is exempt from notice-and-comment requirements. In that case, the Supreme Court held a pronouncement of the exercise of discretion is a general statement of policy. In particular, the Supreme Court emphasized that "[w]hatever else may be considered a 'general statemen[t] of policy,' the term surely includes an announcement like the one before us, that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation." *See Lincoln*, 508 U.S. at 196-97. As the D.C. Circuit has explained in rejecting a notice-and-comment claim to an action committed to agency discretion, "there is no need to create a record for judicial review where there is no cause of action for substantive judicial review of the designation decision." *Make The Rd. N.Y. v. Wolf*, 962 F.3d 612, 634-35 (D.C. Cir. 2020) ("Where Congress leaves the notice-and-comment process no work to do

and expressly authorizes the Executive Branch to exercise its unreviewable discretion 'at any time,' the APA does not require an agency to undertake the process for its own sake.").

This logic makes sense, especially when applied to the policy at issue here. Again, the Fifth Circuit recognized 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." *Texas* Stay Op., 14 F.4th at 340. Here, the memorandum being challenged only concerns such decisions, *i.e.*, when it comes to apprehension and removal of noncitizens. *See* New Guidance at 1 ("This memorandum provides guidance for the apprehension and removal of noncitizens."). Thus, just as in *Lincoln*, guidance in how to exercise that discretion is not subject to notice and comment when the underlying substantive matter is not subject to judicial review. That is certainly true here. *See, e.g.*, *Texas* Stay Op., 14 F.4th at 338 (emphasizing the "strong background principle that the 'who to charge' decision is committed to law enforcement discretion, including in the immigration arena") (citation omitted); *id*. at 339 ("Against this absence of any authority limiting the executive's discretion in deciding whether to bring a removal proceeding is longstanding precedent holding that the use of 'shall' in arrest laws does not limit prosecutorial discretion.").

Nevertheless, even under this Court's previous logic that the Interim Guidance should have undergone notice and comment, the New Guidance would not require as such. As discussed above, the Secretary has instructed line offices to exercise their judgment and discretion in considering the totality of the circumstances. Likewise, no individual has any "right" to be exempt from enforcement based on the Secretary's guidance. Finally, the States cannot bootstrap an "obligation" to their claim that they are injured by the policy. *See* Pls.' Mem. 38 (claiming a financial injury is sufficient to establish that a policy creates binding obligations). Whether a party is injured such that it has standing is entirely distinct from whether the policy that allegedly injures it creates obligations. *See, e.g.*, *Jordan v. Fed. Bureau of Prisons*, Civ. A. No. 20-01478 (CKK), 2021 WL 4148549, at *8-*11 (D.D.C. Sept. 13, 2021) (finding Bureau of Prisons policy for calculating monetary fines for disciplinary charges to be exempt from notice-and-comment

notwithstanding the plaintiffs had a monetary fine and established standing), *appeal filed*, No. 21-5217 (D.C. Cir. Oct. 7, 2021).

But, regardless, the question of whether a policy is a substantive rule subject to notice and comment must not be viewed through a formalistic lens of whether (1) rights and obligations flow from the policy, and (2) whether it genuinely leaves room for discretion; instead, a "matter of judgment is involved in distinguishing between rules however discretionary in form, that effectively circumscribe administrative choice." *Accord Texas* D. Ct. Op., 2021 WL 3683913, at *53 (citations omitted). Here, the New Guidance is a general statement of policy, exempt from notice-and-comment requirements, "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'" *See id.* at *54 (quoting *Lincoln,* 508 U.S. at 197, for what is considered a general statement of policy). Hence, "[t]he key inquiry . . . is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case," and that "[a]s long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm." *Accord id*. (quoting *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596-97 (5th Cir. 1995)). There can be no dispute that the New Guidance does just that.

Under the New Guidance, the agency is free to consider individual facts and consider the totality of the circumstances. *Contra* Pls.' Mem. 37-38 (claiming that the New Guidance does not allowed for individualized discretion notwithstanding that the guidance expressly states the opposite). In fact, the Secretary has made that a central underpinning of the entire guidance. *See* New Guidance at 3-4 (instructing line officers to make an "assessment of the individual and the totality of the facts and circumstances," in consideration of aggravating and mitigating factors, and that officers must "exercise their judgment accordingly"). Even under the interim priorities, that was the case in which the presumptions and pre-approval process still allowed for individual considerations. *See* AART Date Memo (approval rate exceeding 90% for "other priority" cases, with the median approval rate across field offices at 98%). But even if that was not the case for the

Interim Guidance, this new policy does not have a pre-approval process and, rather, it "dispens[es] with the pre-approval process in the exercise of [] discretion." *See* Consideration Memo at 20 (concluding that the decision to dispense with the pre-approval process "was based largely on feedback from members of the workforce, who sought additional flexibility in the exercise of their judgment"). Instead, "the specific determination as to who presents a public safety threat is delegated to the field, which is instructed and empowered to make individualized decisions based on a case-by-case analysis and taking into consideration aggravating factors—such as the gravity of the offense of conviction and the sentence imposed, the nature and degree of harm of the offense, the sophistication of the criminal offense, the use or threatened use of a firearm or dangerous weapon, and a serious prior criminal record, and mitigating factors—including advance or tender age, lengthy presence in the United States, impact of removal on family in the United States, and other relevant considerations." *Id.* at 19. Thus, the New Guidance must be considered a general statement of policy exempt from notice-and-comment requirements.

Similarly, even if it was binding in some fashion, the New Guidance should be considered a procedural rule. *See Texas*, 809 F.3d at 176 (a "binding rule is not required to undergo notice and comment if it is one 'of agency organization, procedure, or practice'") (quoting 5 U.S.C. § 553(b)(A)). This Court previously rejected this view. *See Texas* D. Ct. Op, 2021 WL 3683913, at *56-*58. But the analysis that the Interim Guidance violated the "substantial impact test" was premised on it affecting the "rights and obligations of Texas, DHS, and certain aliens." *Id*. at *57. As the Fifth Circuit, however, observed, the exercise of prosecutorial discretion in the decision of who to apprehend and remove does not affect any statutory obligation. *Compare Texas* Stay Op., 14 F.4th at 337 ("we believe [that 8 U.S.C. §§ 1226 and 1231] do not eliminate[s] immigration officials' 'broad discretion' to decide who should face enforcement action in the first place") (quoting *Arizona*, 567 U.S. at 396) *with* Pls.' Mem. 38-39 (claiming a statutory change without acknowledging the Fifth Circuit's decision). Thus, by its very nature, guidance for the exercise of that discretion does not affects anyone's rights and obligations. That was true with the Interim Guidance but there can be no doubt that it is true for the New Guidance, when any individual

enforcement decision must be viewed through the totality of the circumstances. *Contra* Pls.' Mem. 38-39 (arguing again that the New Guidance, notwithstanding its express terms, does not allow for individualized discretion).

Accordingly, in light of the Fifth Circuit's unanimous stay decision and the totality of the circumstances approach in the New Guidance, the States are unlikely to prevail on their notice-and-comment claim.

D. Texas and Louisiana fail to state a viable claim under the Take Care Clause.

The States also assert that the New Guidance violates the Take Care Clause, U.S. Const. art. II, § 3, because it violates §§ 1226(c) and 1231(a)(1)(A). *See* Pls.' Mem. 39-41. The States' Take Care claim fails for the same reasons as all the other claims fail: the Fifth Circuit has found that agency action such as this one is committed to agency discretion. *See Chaney*, 470 U.S. at 832 (recognizing "that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed'") (quoting U.S. Const. art. II, § 3). But, regardless, the States' assertion collapses into their argument that the Secretary's enforcement prioritization exceeds his statutory authority, and is flatly contradicted by the Supreme Court's admonishment in *Dalton v. Specter* that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." 511 U.S. 462, 473 (1994). As demonstrated above, the Secretary's New Guidance—far from being incompatible with the statute—is firmly supported by foundational principles concerning the exercise of enforcement discretion, as recognized by the Fifth Circuit's stay decision, and a long history recognized by the Supreme Court. *See, e.g., Arizona*, 567 U.S. at 396 ("A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.") (internal citation omitted), *accord Texas* Stay Op., 14 F.4th at 338 ("The first building block of our prediction [that Texas and Louisiana are unlikely to prevail] is the strong

background principle that the 'who to charge' decision is committed to law enforcement discretion, including in the immigration arena.") (citing *AADC*, 525 U.S. at 483; *Arizona*, 567 U.S. at 396).

Regardless, the Take Care Clause cannot a furnish basis for affirmative relief in an Article III court. For the Judicial Branch to superintend how the President performs his executive functions would express a "lack of the respect due" to the Nation's highest elected official. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Indeed, the Supreme Court has recognized that "the duty of the President in the exercise of the power to see that the laws are faithfully executed" "is purely executive and political," and not subject to judicial direction. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866). And *Armstrong v. Exceptional Child Center, Inc.*, on which Texas inexplicably relies, *see* Pls.' Mem. 40, confirms that "the Supremacy Clause is not the source of any federal rights,. . . and certainly does not create a cause of action," *see* 575 U.S. 320, 324 (2015) (internal citation omitted).

The States try to circumvent this controlling authority by citing an out-of-circuit district court case that was not even addressing a Take Care Clause claim. *See* Pls.' Mem. 39-40 (citing *Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 258 (S.D.N.Y. 2020)). There, the district court found that a presidential proclamation was reviewable as a potential constitutional separation of powers violation. But that decision contravenes the Supreme Court's decision in *Dalton*. As *Dalton* explained, almost any challenge to the President's exercise of power under a statute could be recast as an allegation that the President violated the Constitution by exceeding Congress's grant of authority. 511 U.S. at 472. The States also argue that they can bring the claim as an APA action for a constitutional claim or as an independent action, but both are unavailing. *See* Pls.' Mem. 26. The Take Care Clause is directed at the President. Yet, an APA action is unavailable against the President, and, independent of the APA, longstanding precedent stands for the straightforward proposition that an injunction cannot run against the President. *See Franklin v. Massachusetts*, 505 U.S. 788, 796, 800-01 (1992). In any event, the States' action is against other executive branch officials and they have already brought other statutory claims that these officials exceeded their statutory authority.

Regardless, the Secretary faithfully—and vigorously—executed the immigration laws by ensuring DHS's limited resources are utilized for the highest priority criminal noncitizens while still allowing for the exercise of discretion. *See* New Guidance at 3 (instructing line officers to make an "assessment of the individual and the totality of the facts and circumstances," based on aggravating and mitigating factors, in determining whether an individual "poses a current threat to public safety"); *id*. at 4 (emphasizing that, in this context, officers must "exercise their judgment accordingly," with the understanding that "[t]he decision how to exercise prosecutorial discretion can be complicated and requires investigative work"). "Real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty." *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997). This is a proper act of discretion, not a failure to enforce immigration law. *See id.*

II. An Injunction Restraining Core Article II Authority Outweighs Any Harm to the States and Undermines the Public Interest.

Texas and Louisiana cannot establish that they will suffer an injury that outweighs the harm that their requested relief inflicts on the Defendants and the public interest. *See Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). As discussed above, the States cannot show irreparable harm. *See supra* at 14-18. Their requested injunction, however, would impose a significant burden on the United States, and so the Court should deny the States' motion.

Indeed, the Fifth Circuit has already addressed this question: "The injury to the executive's daily exercise of this historic discretion is irreparable in the basic sense of the word; there is no way to recover the time when its exercise of discretion is being enjoined during the pendency of the appeal." *See Texas* Stay Op., 14 F.4th at 341. Such an injury also extends to the public. The New Guidance allows for DHS to focus on individuals who pose the greatest threat to the public. With the Interim Guidance, the agency was able to focus on more serious offenders, nearly doubling enforcement actions against aggravated felons, and shifting resources to the border. *See, e.g.,* AART Data Memo ("Between February 18 and August 31, 2021 ICE arrested 6,046 individuals with aggravated felony convictions compared to just 3,575 in the same period in

2020."); *see also* Berg Decl. ¶ 18 (identifying approximately 300 ICE officers "detailed to the Southwest Border to support CBP operations.").

Likewise, "eliminating DHS's ability to prioritize removals poses a number of practical problems given its limited resources." *See Texas* Stay Op., 14 F.4th at 341. DHS lacks the resources, including appropriated funds and bedspace, to detain all noncitizens the States would seek to have DHS to detain, as well as to protect the public by detaining and removing those individuals DHS has already identified as presenting safety threats and as deemed necessary for border security.[18] *See* Berg Decl. ¶¶ 9-19; Decker Decl. ¶¶ 7-8; Declaration of Monica Burke ¶¶ 6-11, AR DHSP_00006075-DHSP_00006076, attached as Exhibit N. Further, "[a]bsent clear priorities, [DHS] immigration officers may be left with only very general guidance—or no guidance at all—on the exercise of their discretion." Decker Decl. ¶ 12; *see also* Berg Decl. ¶ 20. Likewise, "[a]ny potential policy or operational confusion due to an injunction could additionally harm ICE's relationship with state and local stakeholders." *See, e.g.*, Decker Decl. ¶ 13. In particular, it would cause confusion for the agency to ping-pong between different guidance. *See Texas* Stay Op., 14 F.4th at 341. Here, the agency is already training its workforce on the New Guidance. *See* New Guidance at 6. Finally, any potential compliance with the injunction that the States seek here could interfere with Defendants' obligations in other court cases. *See Texas* Stay Op., 14 F.4th at 341 (identifying one practical "problem[], which highlights the potential for nationwide injunctions to conflict, is that ICE is subject to another nationwide injunction that limits the number of beds it can use in detention centers") (citing *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709 (C.D. Cal. 2020)).[19] Given these practical realities, an injunction would

[18] Although the States do not seek an affirmative injunction here, and instead seek an injunction against any reliance on the New Guidance, the "linchpin" of what they seek is that "mandatory detention laws overcome the ordinary presumption that law enforcement discretion is unreviewable." *See Texas* Stay Op., 14 F.4th at 338 n.4 (finding the legal question the same: "whether matters discussed in the [Interim Guidance], such as who to arrest and charge, are committed to law enforcement discretion").

[19] The Ninth Circuit has since overturned that injunction in a divided panel decision but the mandate has not yet issued and it is still subject to a potential rehearing petition. *See Fraihat v. U.S. Immigr. & Customs*

not be appropriate even if the Court considered the States likely to succeed on the merits. Rather, "[r]emand, not vacatur," and definitely not an injunction, is "generally appropriate" relief in an APA suit. *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389-90 (5th Cir. 2021). And remand without vacatur is particularly appropriate where vacatur or injunctive relief "would be disruptive." *Cent. & S.W. Servs., Inc. v. U.S. EPA*, 220 F.3d 683, 692 (5th Cir. 2000).

In the end, it may be that Texas and Louisiana disagree with DHS's prioritization of certain public safety threats and its utilization of its limited resources, but the federal government—not Texas or Louisiana—is charged with enforcing immigration laws. An injunction that interferes with that assessment is unwarranted.[20]

III. Any Relief Ordered Should Be Narrow.

"When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'" *ODonnell v. Harris Cnty.,* 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Thus, a "district court abuses its discretion if it does not 'narrowly tailor an injunction to remedy the specific action which gives rise to the order.'" *Id.* (quoting *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004)). Accordingly, even if this Court were to grant the States a preliminary injunction, it should limit the injunction. It should refuse the States' request to issue a nationwide injunction and, instead, it should limit any injunction to Texas and Louisiana.

Indeed, this Court has continually "expressed its substantial skepticism of nationwide injunctions," *Texas* Stay Op., 14 F.4th at 341, and should accordingly limit any relief here to

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Enf't, ___F.4th___, 2021 WL 4890884 (9th Cir. Oct. 20, 2021). Regardless, the point still applies: DHS is subject to other legal obligations, including court orders, that go beyond the instant case.

[20] The States claim that statements made in the purported Agreements that the last Administration entered into with Texas and Louisiana during its waning days support an injunction. But, besides considering how those Agreements were unenforceable as efforts to contract away sovereign rights, DHS also noted that the Agreements had been terminated by the time of issuance of the New Guidance. *See* Considerations Memo at 16 n. 52; *see also* ECF Nos. 42-3, 42-4 (copies of DHS's February 2, 2021, termination letters to Texas and Louisiana).

enforcement actions that take place in the plaintiff states: Texas and Louisiana. Notwithstanding this "substantial skepticism," this Court has previously granted nationwide relief because it determined it was "bound by applicable Fifth Circuit precedent in determining whether a nationwide scope for an injunction is appropriate." *Id*. But, in its unanimous stay decision, the Fifth Circuit emphasized that "in recent years the Supreme Court has repeatedly stayed nationwide injunctions that prevented the Executive Branch from pursuing its immigration policies." *Texas* Stay Op., 14 F.4th at 341. Further, it noted that the Fifth Circuit decision that this Court relied upon merely "stated that 'in appropriate circumstances' a court *may* 'issue a nationwide injunction,'" not that such relief would be necessary in every immigration case. *Id*. (emphasis added) (quoting *Texas v. United States*, 809 F.3d at 188). Thus, this Court must use its judgment in deciding whether to issue a nationwide injunction, because the Fifth Circuit made clear nationwide relief is not mandatory.

Here, especially in light of denials of preliminary injunctions in two other jurisdictions on the Interim Guidance, this Court should limit any injunction to the parties before it: Texas and Louisiana. *Texas* Stay Op., 14 F.4th at 336 (discerning that "even though district courts have rejected challenges to the same enforcement priorities brought by Florida and Arizona, the district court's preliminary injunction applies to federal immigration authorities in those states and all others"). As a general matter, nationwide relief that would affect those who are not parties to this case would exceed this Court's authority under Article III and violate longstanding equitable doctrine. "Article III of the Constitution limits the exercise of the judicial power to 'Cases' and 'Controversies.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Indeed, to grant a nationwide injunction here would make Justice Gorsuch's warning a reality: "If a single successful challenge is enough to stay the challenged rule across the country, the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J. concurring), *denying modification*, 140 S. Ct. 2709 (2020). In the end, Article III and equitable principles, including respect for sister

courts, dictate that any injunction should be no broader than necessary to address the purported harm that would occur absent a preliminary injunction.

CONCLUSION

For the reasons stated herein, the States' motion for a delay of the effective date of agency action or, in the alternative, preliminary injunction should be denied. To the extent this Court issues relief for the States on this motion, Defendants ask that the Court enter an administrative stay for at least seven days to allow Defendants to consider further proceedings.

Dated: November 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the total number of words in this motion, exclusive of the matters designated for omission, is 19,454 as counted by Microsoft Word.

/s/ Adam D. Kirschner
ADAM D. KIRSCHNER

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on November 12, 2021.

/s/ Adam D. Kirschner
ADAM D. KIRSCHNER

Exhibit A

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 30, 2021

MEMORANDUM TO: Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

CC: Troy Miller
Acting Commissioner
U.S. Customs and Border Protection

Ur Jaddou
Director
U.S. Citizenship and Immigration Services

Robert Silvers
Under Secretary
Office of Strategy, Policy, and Plans

Katherine Culliton-González
Officer for Civil Rights and Civil Liberties
Office for Civil Rights and Civil Liberties

Lynn Parker Dupree
Chief Privacy Officer
Privacy Office

FROM: Alejandro N. Mayorkas
Secretary

SUBJECT: Guidelines for the Enforcement of Civil Immigration Law

This memorandum provides guidance for the apprehension and removal of noncitizens.

I am grateful to you, the other leaders of U.S. Immigration and Customs Enforcement, and our frontline personnel for the candor and openness of the engagements we have had to help shape this guidance. Thank you especially for dedicating yourselves – all your talent and energy – to the noble law enforcement profession. In executing our solemn responsibility to enforce immigration

law with honor and integrity, we can help achieve justice and realize our ideals as a Nation. Our colleagues on the front lines and throughout the organization make this possible at great personal sacrifice.

I. Foundational Principle: The Exercise of Prosecutorial Discretion

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 exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition. The United States Supreme Court stated this clearly in 2012:

> "A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."

In an opinion by Justice Scalia about twelve years earlier, the Supreme Court emphasized that enforcement discretion extends throughout the entire removal process, and at each stage of it the executive has the discretion to not pursue it.

It is estimated that there are more than 11 million undocumented or otherwise removable noncitizens in the United States. We do not have the resources to apprehend and seek the removal of every one of these noncitizens. Therefore, we need to exercise our discretion and determine whom to prioritize for immigration enforcement action.

In exercising our discretion, we are guided by the fact that the majority of undocumented noncitizens who could be subject to removal have been contributing members of our communities for years. They include individuals who work on the frontlines in the battle against COVID, lead our congregations of faith, teach our children, do back-breaking farm work to help deliver food to our table, and contribute in many other meaningful ways. Numerous times over the years, and presently, bipartisan groups of leaders have recognized these noncitizens' contributions to state and local communities and have tried to pass legislation that would provide a path to citizenship or other lawful status for the approximately 11 million undocumented noncitizens.

The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it.

By exercising our discretionary authority in a targeted way, we can focus our efforts on those who pose a threat to national security, public safety, and border security and thus threaten America's well-being. We do not lessen our commitment to enforce immigration law to the best of our ability. This is how we use the resources we have in a way that accomplishes our enforcement mission most effectively and justly.

II. Civil Immigration Enforcement Priorities

We establish civil immigration enforcement priorities to most effectively achieve our goals with the resources we have. We will prioritize for apprehension and removal noncitizens who are a threat to our national security, public safety, and border security.

A. Threat to National Security

A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security, is a priority for apprehension and removal.

B. Threat to Public Safety

A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal.

Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

There can be aggravating factors that militate in favor of enforcement action. Such factors can include, for example:

- 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.

Conversely, there can be mitigating factors that militate in favor of declining enforcement action. Such factors can include, for example:

- advanced or tender age;
- lengthy presence in the United States;
- a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;
- status as a victim of crime or victim, witness, or party in legal proceedings;
- the impact of removal on family in the United States, such as loss of provider or caregiver;
- whether the noncitizen may be eligible for humanitarian protection or other immigration relief;
- 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.

The above examples of aggravating and mitigating factors are not exhaustive. The circumstances under which an offense was committed could, for example, be an aggravating or mitigating factor depending on the facts. The broader public interest is also material in determining whether to take enforcement action. 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.

Again, our personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly. The overriding question is whether the noncitizen poses a current threat to public safety. Some of the factors relevant to making the determination are identified above.

The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of 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.

C. Threat to Border Security

A noncitizen who poses a threat to border security is a priority for apprehension and removal.

A noncitizen is a threat to border security if:

(a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or

(b) they are apprehended in the United States after unlawfully entering after November 1, 2020.

There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

III. Protection of Civil Rights and Civil Liberties

We must exercise our discretionary authority in a way that protects civil rights and civil liberties. The integrity of our work and our Department depend on it. A noncitizen's race, religion, gender, sexual orientation or gender identity, national origin, or political associations shall never be factors in deciding to take enforcement action. A noncitizen's exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action. We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes.

This guidance does not prohibit consideration of one or more of the above-mentioned factors if they are directly relevant to status under immigration law or eligibility for an immigration benefit. For example, religion or political beliefs are often directly relevant in asylum cases and need to be assessed in determining a case's merit.

State and local law enforcement agencies with which we work must respect individuals' civil rights and civil liberties as well.

IV. Guarding Against the Use of Immigration Enforcement as a Tool of Retaliation for the Assertion of Legal Rights

Our society benefits when individuals – citizens and noncitizens alike – assert their rights by participating in court proceedings or investigations by agencies enforcing our labor, housing, and other laws.

It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants' immigration status and vulnerability to removal by, for example, charging inflated rental costs and failing to comply with housing ordinances and other relevant housing standards.

We must ensure our immigration enforcement authority is not used as an instrument of these and other unscrupulous practices. A noncitizen's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion.

V. The Quality and Integrity of our Civil Immigration Enforcement Actions

The civil immigration enforcement guidance does not compel an action to be taken or not taken. Instead, the guidance leaves the exercise of prosecutorial discretion to the judgment of our personnel.

To ensure the quality and integrity of our civil immigration enforcement actions, and to achieve consistency in the application of our judgments, the following measures are to be taken before the effective date of this guidance:

A. Training

Extensive training materials and a continuous training program should be put in place to ensure the successful application of this guidance.

B. Process for Reviewing Effective Implementation

A review process should be put in place to ensure the rigorous review of our personnel's enforcement decisions throughout the first ninety (90) days of implementation of this guidance. The review process should seek to achieve quality and consistency in decision-making across the entire agency and the Department. It should therefore involve the relevant chains of command.

Longer-term review processes should be put in place following the initial 90-day period, drawing on the lessons learned. Assessment of implementation of this guidance should be continuous.

C. Data Collection

We will need to collect detailed, precise, and comprehensive data as to every aspect of the enforcement actions we take pursuant to this guidance, both to ensure the quality and integrity of our work and to achieve accountability for it.

Please work with the offices of the Chief Information Officer; Strategy, Policy, and Plans; Science and Technology; Civil Rights and Civil Liberties; and Privacy to determine the data that should be collected, the mechanisms to collect it, and how and to what extent it can be made public.

D. Case Review Process

We will work to establish a fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken. Discretion to determine the disposition of the case will remain exclusively with the Department.

VI. Implementation of the Guidance

This guidance will become effective in sixty (60) days, on November 29, 2021. Upon the effective date, 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.

We will meet regularly to review the data, discuss the results to date, and assess whether we are achieving our goals effectively. Our assessment will be informed by feedback we receive from our law enforcement, community, and other partners.

This guidance is Department-wide. Agency leaders as to whom this guidance is relevant to their operations will implement this guidance accordingly.

VII. Statement of No Private Right Conferred

This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Exhibit B

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Policy Number 10074.2: **Issuance of Immigration Detainers by ICE Immigration Officers**

Issue Date: March 24, 2017
Effective Date: April 2, 2017
Superseded: Interim Policy No. 10074.1: *Detainers* (Aug. 2, 2010)
Federal Enterprise Architecture Number: 306-112-002b

1. **Purpose/Background.** This Directive establishes U.S. Immigration and Customs Enforcement (ICE) policy and procedures regarding the issuance of civil immigration detainers to federal, state, local, and tribal law enforcement agencies (LEAs). ICE issues detainers to federal, state, local, and tribal LEAs to provide notice of its intent to assume custody of a removable alien detained in federal, state, local, or tribal custody. The Department of Homeland Security's (Department or DHS) detainer authority, codified in section 287.7 of title 8 of the Code of Federal Regulations (C.F.R.), arises from the Secretary of Homeland Security's power under section 103(a)(3) of the Immigration and Nationality Act (INA) to provide regulations "necessary to carry out his authority," and from ICE's general authority to arrest and detain aliens subject to removal or removal proceedings, pursuant to sections 236, 241, and 287 of the INA. The use of immigration detainers, however, long pre-dates any reference to detainers in the statute or regulations.[1] In fact, the former Immigration and Naturalization Service first used the Form I-247 as early as 1952.

   Detainers enable ICE to judiciously deploy its investigative, detention, and removal resources consistent with the immigration enforcement priorities of the Department and the executive branch of the U.S. Government. Detainers also allow ICE immigration officers to avoid the risks to public safety and officer safety associated with arrests outside the custodial environment.

2. **Policy.** It is ICE policy to ensure that ICE immigration officers exercise detainer authority in a manner consistent with all legal requirements and in a manner that ensures ICE's LEA partners may honor detainers.

2.1. The consolidated detainer form, Form I-247A (Immigration Detainer – Notice of Action), attached to this Directive shall be used as of the effective date of this Directive. Form I-247D (Immigration Detainer – Request for Voluntary Action), Form I-247N (Request

[1] *See, e.g.*, *Chung Young Chew v. Boyd*, 309 F.2d 857 (9th Cir. 1962); *Rinaldi v. United States*, 484 F. Supp. 916 (S.D.N.Y. 1977); *Slavik v. Miller*, 89 F. Supp. 575 (W.D. Pa. 1950), *aff'd*, 184 F.2d 575 (3d Cir. 1950), *cert. denied*, 340 U.S. 955 (1951); *Matter of Lehder*, 15 I&N Dec. 159 (BIA 1975).

for Voluntary Notification of Release of Suspected Priority Alien), and Form I-247X (Request for Voluntary Transfer), may no longer be issued. Detainers issued on prior versions of the detainer form remain active and need not be replaced with a Form I-247A. *See* Attachment 8.4 for guidance on how to complete the Form I-274A.

2.2. Only ICE immigration officers, including designated officers of a state or political subdivision of a state authorized to perform certain immigration officer functions under section 287(g) of the INA, may issue immigration detainers.

2.3. Regardless of whether a federal, state, local, or tribal LEA regularly cooperates with DHS immigration detainers, ICE immigration officers shall issue a detainer to the LEA for an alien in the LEA's custody after the alien is arrested for a criminal offense and the officer has probable cause to believe that the subject is an alien who is removable from the United States.

2.4. ICE immigration officers must establish probable cause to believe that the subject is an alien who is removable from the United States before issuing a detainer with a federal, state, local, or tribal LEA. Further, as a matter of policy, all detainers issued by ICE must be accompanied by either: (1) a properly completed Form I-200 (Warrant for Arrest of Alien) signed by an authorized ICE immigration officer; or (2) a properly completed Form I-205 (Warrant of Removal/Deportation) signed by an authorized ICE immigration officer.[2]

2.5. Except for circumstances in which the alien is detained in ICE custody at the time the detainer is issued, an ICE immigration officer shall not issue an immigration detainer to an LEA unless the LEA has arrested the alien for a criminal offense in an exercise of the LEA's independent arrest authority.[3] ICE Immigration officers shall not issue an immigration detainer for an alien who has been temporarily detained or stopped, but not arrested, by another LEA. This does not preclude the LEA from temporarily detaining an alien while an ICE immigration officer responds to the scene.

2.6. An ICE immigration officer may not issue a detainer based upon the initiation of an investigation to determine whether the subject is a removable alien. An ICE immigration officer may not establish probable cause of alienage and removability, for purposes of detainer issuance, solely based on evidence of foreign birth and the absence of records in available databases ("foreign-born-no match").

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[2] Although ICE maintains that this is not legally required, ICE is implementing this warrant measure as a nationwide policy in light of one district court's ruling that detention pursuant to an ICE detainer constitutes a warrantless arrest and that section 287(a)(2) of the INA only authorizes a warrantless arrest if there is reason to believe the alien will escape before an arrest warrant can be secured. *See Moreno v. Napolitano*, --- F. Supp. 3d ---, 2016 WL 5720465, at *8 (N.D. Ill. Sept. 30, 2016).

[3] Box 2 on Form I-247A (Immigration Detainer – Notice of Action) is used by ICE to ensure that an alien detained in ICE's custody is returned to ICE custody after being transferred to another LEA for a proceeding or investigation. Such detainers may be issued prior to the other LEA assuming custody of the subject of the detainer.

2.7. ICE immigration officers must promptly assume custody of an alien who is the subject of an immigration detainer. Further, ICE immigration officers should assume custody of an alien subject as soon as practicable, and as close as possible to the time at which the alien would otherwise have been released by the relevant LEA, but in no circumstances more than 48 hours after such time. If it becomes apparent that ICE cannot assume custody of the alien within 48 hours of when he or she would otherwise be released, the ICE immigration officer should immediately cancel the detainer.

2.8. In some cases, after issuing an immigration detainer for an individual in the custody of a federal, state, local, or tribal LEA, ICE may determine that it will not assume custody of the subject. In these cases, the ICE immigration officer must cancel the immigration detainer as soon as such determination is made.

2.9. As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a U.S. citizen.[4]

3. Definitions. The following definitions apply only for purposes of this directive.

3.1. Detainer. A notice that ICE issues to a federal, state, local, or tribal LEA to inform the LEA that ICE intends to assume custody of a removable alien in the LEA's custody.

3.2. ICE Immigration Officer. The term "ICE immigration officer" means Enforcement and Removal Operations (ERO) deportation officers and Homeland Security Investigations (HSI) special agents, including supervisory and managerial personnel who are responsible for supervising authorized immigration officers, as well as designated officers of a state or political subdivision of a state authorized to perform certain immigration officer functions under section 287(g) of the INA. *See* 8 C.F.R. § 287.7(b).

3.3. Probable Cause. The facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy information that are sufficient in themselves to warrant a person of reasonable caution in the belief that an individual is a removable alien.

4. Responsibilities.

4.1. All ICE employees are responsible for complying with the policy and procedures set forth in this Directive.

4.2. ICE immigration officers, including designated immigration officers of a state or political subdivision of a state authorized to perform certain immigration officer functions under section 287(g) of the INA, are responsible for issuing and executing

[4] ICE immigration officers must comply with requirements of ICE Policy No. 16001.2, *Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE* (Nov. 10, 2015), when issuing detainers. In particular, footnote 1 of that policy specifically applies to prior versions of the detainer "and/or any successor form serving the same or substantially similar" purpose.

immigration detainers in accordance with the policy and procedures set forth in this Directive.

4.3. **ICE ERO Assistant Directors, Deputy Assistant Directors, Field Office Directors (FODs), and the Directors of the National Criminal Analysis and Targeting Center, the Pacific Enforcement Response Center, and the Law Enforcement Support Center,** and their designees, as well as the **ICE HSI Assistant Director for Domestic Operations** and **ICE HSI Special Agents in Charge (SACs)** and their designees, are responsible for disseminating and ensuring compliance with this Directive.

5. **Procedures.**

5.1. **Establishing Probable Cause.**

As a matter of policy, a detainer must be supported by probable cause based upon one of the following four categories of information:

1) A final order of removal against the alien;

2) The pendency of ongoing removal proceedings against the alien, including cases in which DHS has issued a charging document and served the charging document on the alien;

3) Biometric confirmation of the alien's identity and a records match in federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks lawful immigration status or, notwithstanding such status, is removable under U.S. immigration law; and/or

4) Statements made voluntarily by the alien to an ICE immigration officer and/or other reliable evidence that indicate the alien either lacks lawful immigration status or, notwithstanding such status, is removable under U.S. immigration law.

An ICE immigration officer may not issue a detainer prior to establishing probable cause to believe that the subject is a removable alien. Further, an ICE immigration officer may not issue a detainer based upon the initiation of an investigation to determine whether the subject is a removable alien. The pendency of ongoing removal proceedings refers to cases in which DHS has issued a charging document and served the charging document on the alien. As a matter of policy, an ICE immigration officer may not establish probable cause of alienage and removability, for purposes of detainer issuance, solely based on evidence of foreign birth and the absence of records in available databases ("foreign-born-no match").

5.2. **Issuing an Immigration Detainer and Administrative Warrant.** All immigration detainers (Form I-247A Immigration Detainer – Notice of Action) must be accompanied by either Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal/Deportation).

1) If the subject of the detainer is a removable alien who is not yet subject to a final order of removal, the ICE immigration officer who issues the detainer shall attach a Form I-200 (Warrant for Arrest of Alien) to the detainer.

   a. The Form I-200 shall be issued by any of the supervisory immigration officials listed at 8 C.F.R. § 287.5(e)(2).

2) If the subject of the detainer is also the subject of a final order of removal, including where the alien is subject to reinstatement of removal under section 241(a)(5) of the INA, the ICE immigration officer who issues the detainer shall attach a Form I-205 (Warrant of Removal/Deportation) to the immigration detainer.

   a. The Form I-205 shall be issued by any of the supervisory immigration officials listed in 8 C.F.R. § 241.2(a)(1).

5.3. **Declined Immigration Detainers.** When ICE becomes aware that an LEA failed to honor an immigration detainer issued by ICE, the ICE immigration officer shall document the declined detainer in the ENFORCE Alien Removal Module (EARM) through the use of the detainer lift code of "A – Declined by LEA."

5.4. **Cancelling an Immigration Detainer.** If after issuing an immigration detainer ICE determines that it will not assume custody of the subject, the ICE immigration officer must cancel the immigration detainer.

1) Form I-247A shall be issued to the relevant LEA requesting cancellation of the detainer; and

2) All cancelled detainers shall be documented in EARM through the use of the detainer lift code of "L - Lifted", or using another case-specific lift code requiring the cancellation of the detainer (e.g. "D – Died", "N – Alien not subject to deportation").

6. **Recordkeeping.** ICE maintains records generated pursuant to this policy, specifically Forms I-247A (Immigration Detainer-Notice of Action), Forms I-200 (Warrant for Arrest of Alien) and Forms I-205 (Warrant of Removal/Deportation) in the Alien File.

7. **Authorities/References.**

7.1. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, as amended (codified at 8 U.S.C. §§ 1101 *et seq.*).

7.2. 8 C.F.R. §§ 236.1, 241.2, 287.3, 287.5, 287.7.

7.3. *Moreno v. Napolitano*, --- F. Supp. 3d ---, 2016 WL 5720465 (N.D. Ill. Sept. 30, 2016).

7.4. Executive Order 13768, *Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017).

7.5. Memorandum from DHS Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).

7.6. ICE Policy No. 16001.2, *Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE* (Nov. 10, 2015).

7.7. ICE Policy No. 13001.1, *State Personnel Designated to Act as Immigration Officers for Immigration Enforcement Purposes* (Dec. 4, 2008).

8. Attachments.

8.1. Form I-247A (Immigration Detainer – Notice of Action).

8.2. Form I-200 (Warrant for Arrest of Alien).

8.3. Form I-205 (Warrant of Removal/Deportation).

8.4. ICE Guidance For Completing the Form I-247A.

9. No Private Right Statement. This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create or diminish any rights, substantive or procedural, enforceable at law or equity by any party in any criminal, civil, or administrative matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Exhibit C

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 20, 2021

MEMORANDUM FOR: Troy Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Tracey Renaud
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services

CC: Karen Olick
Chief of Staff

FROM: David Pekoske
Acting Secretary

SUBJECT: **Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities**

This memorandum directs Department of Homeland Security components to conduct a review of policies and practices concerning immigration enforcement. It also sets interim policies during the course of that review, including a 100-day pause on certain removals to enable focusing the Department's resources where they are most needed. The United States faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century. In light of those unique circumstances, the Department must surge resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security.

This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS).

A. Comprehensive Review of Enforcement Policies and Priorities

The Chief of Staff shall coordinate a Department-wide review of policies and practices concerning immigration enforcement. Pursuant to the review, each component shall develop recommendations to address aspects of immigration enforcement, including policies for prioritizing the use of enforcement personnel, detention space, and removal assets; policies governing the exercise of prosecutorial discretion; policies governing detention; and policies regarding interaction with state and local law enforcement. These recommendations shall ensure that the Department carries out our duties to enforce the law and serve the Department's mission in line with our values. The Chief of Staff shall provide recommendations for the issuance of revised policies at any point during this review and no later than 100 days from the date of this memo.

The memoranda in the attached appendix are hereby rescinded and superseded.

B. Interim Civil Enforcement Guidelines

Due to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States. Rather, DHS must implement civil immigration enforcement based on sensible priorities and changing circumstances. DHS's civil immigration enforcement priorities are protecting national security, border security, and public safety. The review directed in section A will enable the development, issuance, and implementation of detailed revised enforcement priorities. In the interim and pending completion of that review, the Department's priorities shall be:

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.

These priorities shall 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. In

addition, all enforcement and detention decisions shall be guided by DHS's ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols.

While resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein. In order to ensure appropriate allocation of resources and exercise of prosecutorial discretion, the Acting Director of ICE shall issue operational guidance on the implementation of these priorities. This guidance shall contain a protocol for the Acting Secretary to conduct a periodic review of enforcement actions to ensure consistency with the priorities set forth in this memorandum. This guidance shall also include a process for the Director of ICE to review and approve of any civil immigration enforcement actions against individuals outside of federal, state or local prisons or jails.

These interim enforcement priorities shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the review directed in section A.

C. Immediate 100-Day Pause on Removals

In light of the unique circumstances described above, DHS's limited resources must be prioritized to: (1) provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently; and (2) comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact. In addition, we must ensure that our removal resources are directed to the Department's highest enforcement priorities. Accordingly, and pending the completion of the review set forth in section A, I am directing an immediate pause on removals of any noncitizen[1] with a final order of removal (except as noted below) for 100 days to go into effect as soon as practical and no later than January 22, 2021.

The pause on removals applies to any noncitizen present in the United States when this directive takes effect with a final order of removal except one who:

1. According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
2. Was not physically present in the United States before November 1, 2020; or
3. Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver

[1] "Noncitizen" as used in this memorandum does not include noncitizen nationals of the United States.

and has been given a meaningful opportunity to access counsel prior to signing the waiver;[2] or

4. For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

No later than February 1, 2021, the Acting Director of ICE shall issue written instructions with additional operational guidance on the further implementation of this removal pause. The guidance shall include a process for individualized review and consideration of the appropriate disposition for individuals who have been ordered removed for 90 days or more, to the extent necessary to implement this pause. The process shall provide for assessments of alternatives to removal including, but not limited to, staying or reopening cases, alternative forms of detention, custodial detention, whether to grant temporary deferred action, or other appropriate action.

D. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

[2] A voluntary waiver encompasses noncitizens who stipulate to removal as part of a criminal disposition.

APPENDIX

Department of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest,* Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Implementing the President's Border Security and Interior Immigration Enforcement Policies*, Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement*, Memorandum of August 15, 2017.

US Citizenship and Immigration Services, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,* Policy Memorandum of June 28, 2018. (US Citizenship and Immigration Services should revert to the preexisting guidance in Policy Memorandum 602-0050, US Citizenship and Immigration Services, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, Policy Memorandum of Nov. 7, 2011.)

US Citizenship and Immigration Services, *Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection with a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA,* Policy Memorandum of June 28, 2018.

U.S. Customs and Border Protection, *Executive Orders 13767 and 13768 and the Secretary's Implementation Directions of February 17, 2017*, Memorandum of February 21, 2017.

Exhibit D

Policy Number: 11090.1
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

February 18, 2021

MEMORANDUM FOR: All ICE Employees

FROM: Tae D. Johnson
Acting Director

SUBJECT: Interim Guidance: Civil Immigration Enforcement and Removal Priorities

Purpose

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. Acting Secretary Pekoske issued the interim priorities in his memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Interim Memo).

This interim guidance is effective immediately. It applies to all U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning.

This interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines. The Secretary has informed me that he will issue new guidelines only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices. He anticipates issuing these guidelines in less than 90 days.

I have requested approval of certain revisions to the Interim Memo until the Secretary issues new enforcement guidelines. My requested revisions have been approved, and they are incorporated into this guidance. To the extent this guidance conflicts with the Interim Memo, this guidance controls. As you will read below, the revisions include, but are not limited to: (1) authorization to apprehend presumed priority noncitizens[1] in at-large enforcement actions without advance approval; (2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities; (3) authorization to apprehend

[1] For purposes of this memorandum, "noncitizen" means any person as defined in section 101(a)(3) of the Immigration and Nationality Act (INA).

without prior approval other presumed priority noncitizens who are encountered during enforcement operations; (4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended; (5) the further delegation of approval authority; and (6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

Section C of the Interim Memo has been enjoined. This memorandum does not implement, nor take into account, Section C. This memorandum implements Section B (Interim Civil Enforcement Guidelines).

Background

On January 20, 2021, President Biden issued Executive Order (EO) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021), which articulated the Administration's baseline values and priorities for the enforcement of the civil immigration laws.

On the same day, Acting Secretary Pekoske issued the Interim Memo. The Interim Memo did four things. First, it directed a comprehensive Department-wide review of civil immigration enforcement policies. Second, it established interim civil immigration enforcement priorities for the Department. Third, it instituted a 100-day pause on certain removals pending the review. Fourth, it rescinded several existing policy memoranda, including two ICE-related memoranda, as inconsistent with EO 13993.[2] The Interim Memo further directed that ICE issue interim guidance implementing the revised enforcement priorities and the removal pause.

On January 26, 2021, the U.S. District Court for the Southern District of Texas issued a temporary restraining order (TRO) enjoining the Department from enforcing and implementing the 100-day removal pause in Section C.

Like other national security and public safety agencies, ICE operates in an environment of limited resources. Due to these limited resources, ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others.

In addition to resource constraints, several other factors render ICE's mission particularly complex. These factors include ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and, relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal.

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[2] Memorandum from Matthew T. Albence, Exec. Assoc. Dir., ICE, to All ERO Employees, *Implementing the President's Border Security and Interior Immigration Enforcement Policies* (Feb. 21, 2017); Memorandum from Tracy Short, Principal Legal Advisor, ICE, to All OPLA Attorneys, *Guidance to OPLA Attorneys Regarding Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).

Accordingly, in executing its critical national security, border security, and public safety mission, the Department must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission.

Civil Immigration Enforcement and Removal Priorities

In support of the interim priorities, the guidance established in this memorandum shall be applied to all civil immigration enforcement and removal decisions made after the issuance of this memorandum. The civil immigration enforcement and removal decisions include, but are not limited to, the following:[3]

- Deciding whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
- Deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- Deciding whether to focus resources only on administrative violations or conduct;
- Deciding whether to stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;
- Deciding whether to detain or release from custody subject to conditions;
- Deciding whether to grant deferred action or parole; and
- Deciding when and under what circumstances to execute final orders of removal.

For ease of reference, the interim priorities identified in the Interim Memo, and as revised by this guidance, are set forth below along with further explanation.

As a preliminary matter, it is vitally important to note that the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen. Rather, officers and agents are expected to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission. Enforcement and removal actions that meet the criteria described below are presumed to be a justified allocation of ICE's limited resources. Actions not reflected in the criteria described below may also be justified, but they are subject to advance review as outlined further below.

In determining whether to pursue an action that falls outside the criteria described below, all relevant facts and circumstances regarding the noncitizen should be considered. For instance, officers and agents should consider: whether there are criminal convictions; the seriousness and recency of such convictions, and the sentences imposed; the law enforcement resources that have been spent; whether a threat can be addressed through other means, such as through recourse to criminal law enforcement authorities at the federal, state, or local level, or to public health and other civil authorities at the state or local level; and, other relevant factors (including, for example, the mitigating factors identified on page 5).

[3] As discussed above, the Department is enjoined from enforcing the Immediate 100-Day Pause on Removals in the Interim Memo. This following interim guidance should not be read to permit implementation of Section C of the Interim Memo.

Criteria Defining Cases That Are Presumed to be Priorities

Priority Category 1: National Security. A noncitizen is *presumed* to be a national security enforcement and removal priority if:

1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-related activities;
2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities;[4] or
3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

In evaluating whether a noncitizen's "apprehension, arrest, or custody is otherwise necessary to protect" national security, officers and agents should determine whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity does not amount to a national security threat (as distinguished from a public safety threat) and is discussed below.

Priority Category 2: Border Security. A noncitizen is *presumed* to be a border security enforcement and removal priority if:

1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020[5]; or
2) he or she was not physically present in the United States before November 1, 2020.

To be clear, the border security priority includes any noncitizen who unlawfully entered the United States on or after November 1, 2020.

Priority Category 3: Public Safety. A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and:

1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA[6]; or

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[4] For purposes of the national security enforcement priority, the terms "terrorism or terrorism-related activities" and "espionage or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)-(iv) of the INA, and (2) the manner in which the term "espionage" is generally applied in the immigration laws.
[5] The statutory mandates in Section 235 of the INA (regarding asylum seekers) continue to apply to noncitizens.
[6] This criterion tracks Congress's prioritization of aggravated felonies for immigration enforcement actions. Whether an individual has been convicted of an aggravated felony is a complex question that may involve securing and analyzing a host of conviction documents, many of which may not be immediately available to officers and agents. Even when all conviction documents are available, whether a conviction is for an aggravated felony may be a novel question under applicable law. Accordingly, in deciding whether a noncitizen has been convicted of an

2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

In evaluating whether a noncitizen currently "pose[s] a threat to public safety," officers and agents are to consider the extensiveness, seriousness, and recency of the criminal activity. Officers and agents are to also consider mitigating factors, including, but not limited to, personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available.

Officers are to base their conclusions about intentional participation in an organized criminal gang or transnational criminal organization on reliable evidence and consult with the Field Office Director (FOD) or Special Agent in Charge (SAC) in reaching this conclusion.

Particular attention is to be exercised in cases involving noncitizens who are elderly or are known to be suffering from serious physical or mental illness. Similarly, particular attention is to be exercised with respect to noncitizens who have pending petitions for review on direct appeal from an order of removal; have filed only one motion to reopen removal proceedings, and such a motion either remains pending or is on direct appeal via a petition for review; or have pending applications for immigration relief and are prima facie eligible for such relief. In such cases, execution of removal orders should have a compelling reason and are to have approval from the FOD.

A civil enforcement or removal action that does not meet the above criteria for presumed priority cases will require preapproval as described below.

Enforcement and Removal Actions: Approval, Coordination, and Data Collection

To ensure compliance with this guidance and consistency across geographic areas of responsibility, and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim guidance, ICE will require that field offices collect data on the nature and type of enforcement and removal actions they perform. In addition, ICE will require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases. The data and coordination will inform the development of the Secretary's new enforcement guidance.

No Preapproval Required for Presumed Priority Cases

Officers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases, beyond what existing policy requires and what a supervisor instructs.

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aggravated felony for purposes of this memorandum, officers and agents must have a good-faith belief based on either a final administrative determination, available conviction records, or the advice of agency legal counsel.

Preapproval for Other Priority Cases

Any civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases will require preapproval from the FOD or SAC. In deciding to undertake an enforcement action or removal, the agent or officer must consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors. In requesting this preapproval, the officer or agent must raise 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.

The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above. An approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above.

In some cases, exigent circumstances and the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action. While it is impossible to preconceive all such circumstances, they generally will be limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property. If preapproval is impracticable, an officer or agent should conduct the enforcement action and then request approval as described above within 24 hours following the action.[7]

As always, it is important that ICE endeavor to remove noncitizens with final removal orders who have remained in post-order detention for more than 90 days. ICE will continue to review such noncitizens' cases on a regular basis, consistent with existing law and policy. ICE will endeavor to remove such noncitizens consistent with legal requirements and national, border security, and public safety priorities.

Periodically, ICE receives requests to exercise some form of individualized discretion in the interests of law and justice. ICE will create and maintain a system by which personnel can evaluate these individualized requests.

Notice of At-Large Enforcement Actions

The execution of an at-large enforcement action should be preceded by notification to the relevant state and local law enforcement agency or agencies. This notification will advance

[7] Where approval is sought following the enforcement action due to exigent circumstances, the request shall explain the exigency, where and when the enforcement activity took place, and whether the noncitizen is currently detained. Additionally, when the location of a proposed or completed enforcement action is a courthouse, as defined in ICE Directive 11072.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018, or as superseded), or a sensitive location, as defined in ICE Directive No. 10029.2, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011, or as superseded), that should be explicitly highlighted in the request.

public safety and help ensure that planned immigration enforcement actions do not improperly interfere with state and local law enforcement investigations and actions.

Weekly Reporting of All Enforcement and Removal Actions

The Director will review all enforcement actions to ensure compliance with this guidance and consistency across geographic areas of responsibility and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim priorities.

Each Friday, the Executive Associate Directors for Enforcement and Removal Operations and Homeland Security Investigations will compile and provide to the Office of the Director, the Office of the Deputy Director, and the Office of Policy and Planning (OPP), a written report: (1) identifying each enforcement action taken in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the action; and (3) identifying the date, time, and location of the action.

In addition, each Friday the Executive Associate Director for Enforcement and Removal Operations will provide to the Office of the Director, the Office of the Deputy Director, and OPP, a written report: (1) identifying each removal in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the removal; and (3) identifying the date, time, and location of the removal.

These reporting requirements will be assessed periodically during this interim period to ensure that they are both productive and manageable.

The weekly reports will be made available to the Office of the Secretary.

Questions

Questions regarding this interim guidance or the Interim Memo should be directed to OPP through the chain of command and Directorate or Program Office leadership. Answers to frequently asked policy questions will be published on OPP's inSight page on an ongoing basis. Please note, however, that case-specific questions should generally be addressed by Directorate or Program Office leadership.

No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Exhibit E

U.S. Immigration and Customs Enforcement

September 24, 2021

MEMORANDUM FOR: Alejandro N. Mayorkas
Secretary
Department of Homeland Security

SUBJECT: Conclusions Drawn from "AART" Data

This memorandum draws high-level conclusions about ICE enforcement guidance based on data generated by the Arrest Authorization Request Tool (AART).

Arrests and Removals

Between February 18 and September 16, 2021, ICE has authorized arrests in:

- 9,918 public safety cases
- 7,157 other priority cases
- 3,696 border security cases
- 57 national security cases

ICE has authorized removals in similar proportions. Several inferences can be drawn from these statistics:

- A plurality of cases meets the criteria of the public safety presumed priority
  - Because this category depends largely on the definition of aggravated felony, it has channeled ICE enforcement efforts toward the arrest and removal of aggravated felons
  - Between February 18 and August 31, 2021 ICE arrested 6,046 individuals with aggravated felony convictions compared to just 3,575 in the same period in 2020

- "Other priority" cases represent the second-most common type of arrest
  - Generally, field offices have become more liberal in authorizing this type of case as time has gone by
  - These "other priority" cases typically feature three kinds of criminal history: sexual assault and other sex offenses; DUIs; and assault, particularly domestic violence. These crimes roughly track serious conduct that does not qualify as aggravated felony conduct.

  - "Dangerous drugs" crimes (an NCIC term that covers everything from possession to distribution, regardless of substance) also feature heavily in ICE enforcement actions but have been distributed across the "other priority" and "public safety" categories

- "Border security" cases have increased as ICE has surged personnel to support southwest border operations. Most of these arrests reflect assistance to CBP rather than traditional interior actions

- The ongoing pursuit of "national security" cases—in essence, noncitizens associated with terrorism or espionage—do not appear affected by the interim guidance

- There are variations among field offices in the proportion of cases pursued across these categories:
  - Southwest border field offices show a higher proportion of border cases:
    - 45% of the El Paso Field Office cases are border security cases, 32% public safety cases, and13.5% other priorities
    - The Houston Field Office saw 42% border security cases, 37% public safety cases, and 20% other priorities
  - Two of the larger offices show a high rate of other priorities:
    - In the Chicago Field Office, fully 59% of cases reflected other priorities, 28% public safety cases, and 12% border security cases
    - The New York Field Office had a similar profile: 56% other priorities, 17% public safety cases, and 25% border security cases
  - Some interior offices had essentially no border security priorities, and higher rates of public safety cases:
    - The Atlanta Field Office had less than half of one percent dedicated to border security, but 52% public safety cases and 48% other priorities
    - In the Los Angeles Field Office, 74% of cases were public safety cases, and 25% were other priorities
    - In San Francisco, 76% of cases were public safety cases, and 23% were other priorities

- Some of these variations appear driven by local circumstances. For example, the border field offices handle more border security cases

- However, other variations—such as the larger proportion of other priorities in Chicago/New York relative to Los Angeles/San Francisco—suggest that FOD enforcement preferences also play a role. This should not be surprising because the February18 guidance delegates significant discretion to the

FODs themselves, thus "building in" to operational guidance a tolerance for variation at the field office level

Approvals and Denials

The February 18 guidance requires ICE officers to obtain FOD approval for "other priority" enforcement actions. According to data on approvals:

- At least 90% of requests are approved
- This approval rate depends to some extent on the nature of the request. For instance, requests to pursue an action against a noncitizen with a conviction for a sex offense are approved at a rate greater than 99%
- The approval rate also depends on the field office
  - Several offices approve more than 99% of all requests
  - The lowest approval rate is seen at the New York (82%) and Denver (89%) field offices
  - The median approval rate is 98%
- While these high approval rates may suggest a permissive approach to "other priority" cases, it appears that many offices have a practice of pre-vetting cases so that officers and their supervisors reach some level of consensus on a case's viability before the officer submits it for approval
  - In this way, the approval regime appears to reinforce a dialogue between officers and supervisors about what cases are worthy of pursuing
- It typically takes 1 hour and 9 minutes for a FOD to authorize a request, suggesting that the approval regime does not unduly delay enforcement actions

Decisions by Senior Reviewing Official

After implementing the February 18 guidance, ICE created a process by which advocates could appeal FOD denials of requests for relief—predominantly requests for release and stays of removal—to a headquarters-based Senior Reviewing Official (SRO). Although not technically derived from AART, data on SRO decision-making sheds further light on implementation of the February 18 guidance.

- The SRO has reversed 18% of FOD denials of requests for release
- The SRO has reversed 20% of FOD denials of requests for a stay of removal

- Some field offices are reversed at a higher rate than others
  - The SRO reversed the New Orleans field office the most, at a rate of approximately 30%
  - The Baltimore, San Diego, and Chicago field offices are reversed at a rate of 27-28%
  - The San Francisco (9%) and Buffalo (10%) field offices are reversed at the lowest rate

- These range of reversal rates across jurisdictions suggest that FOD preferences play a role in the granting of releases and stays. As noted above, this should not be surprising because the February18 guidance delegates significant discretion to the FODs themselves, thus "building in" a tolerance for variation at the field office level

Exhibit F

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

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 6:21-cv-00016

DECLARATION OF PETER B. BERG

I, Peter B. Berg, declare the following under 28 U.S.C. § 1746:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Acting Deputy Executive Associate Director. I have held this position since October 4, 2020. As Acting Deputy Executive Associate Director, I oversee the mission of ERO's eight headquarters divisions: Enforcement, Removal, Non-Detained Management, Custody Management, Field Operations, ICE Health Service Corps, Law Enforcement Systems and Analysis, and Operations Support.
2. Prior to this position, I served as the Assistant Director for Field Operations beginning on June 21, 2020 and had been acting in that role since January 31, 2020. In these capacities, I was responsible for the oversight, direction, and coordination of immigration enforcement activities, programs, and initiatives carried out by ERO's 24 Field Offices and 188 sub-

offices. I further managed ERO Headquarters components, including Domestic Operations, Special Operations, and Law Enforcement Systems and Analysis.

3. I have been a career law enforcement officer since 1996, serving in various capacities with both ICE and the former Immigration and Naturalization Service (INS). Other leadership positions I have held within ICE include: Field Office Director and Deputy Field Office Director for the St. Paul Field Office, Acting Deputy Assistant Director for the ERO Headquarters Criminal Alien Division, and Acting Deputy Assistant Director for the ERO Headquarters Field Operations Division.

4. This declaration is based on my personal knowledge and experience as a law enforcement officer and information provided to me in my official capacity.

II. Overview of ERO

5. Following enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including INS and the U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the enforcement of criminal and civil federal laws governing border control, customs, trade, and immigration. Within ICE, ERO oversees programs and conducts operations to identify and apprehend removable noncitizens, to detain these individuals when necessary, and to remove noncitizens with final orders of removal from the United States. ERO manages and oversees all aspects of the removal process within ICE, including domestic transportation, detention, alternatives to detention programs, bond management, supervised release, and removal to more than 170 countries around the world. As part of the removal process, ERO manages a non-detained docket of more than 3.2 million cases, which

includes noncitizens currently in removal proceedings and those who have already received removal orders and are pending physical removal from the United States.

III. Guidance for Immigration Enforcement and Removal Actions

6. On February 18, 2021, ICE's Acting Director, Tae D. Johnson, issued interim guidance titled, *Civil Immigration Enforcement and Removal Priorities* (Johnson Memorandum) (Feb. 18, 2021), which implements with revisions the priorities set forth in DHS's January 20, 2021 Memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (January 20 Memorandum). The Johnson Memorandum lays out a process to allocate ICE's limited law enforcement resources to achieve its mission by focusing on cases that fall within three "presumed priority" categories: national security, border security, and public safety.

7. Further, the Johnson Memorandum emphasizes that the priorities do not prohibit the arrest, detention, or removal of any noncitizen; to the contrary, the memorandum presumes and sets out a process with respect to actions involving cases that fall outside the three priority categories. As a result, under the Johnson Memorandum, ICE has continued to arrest and remove individuals who meet the three presumed priorities, as well as those who constitute "other priority cases." Under the memorandum, no immigration enforcement action or removal is categorically prohibited. Rather, actions that do not meet the presumed priority criteria require preapproval by the appropriate ERO Field Office Director or Homeland Security Investigations Special Agent in Charge except where exigent circumstances and public safety make preapproval impracticable. Pursuant to this guidance, ICE took approved enforcement actions against individuals with serious and violent pending criminal charges, non-aggravated felon sexual predators, individuals with a nexus to national security threats to

the United States, individuals who are identified as members of Transnational Organized Crime groups, individuals with warrants from foreign governments identified by an INTERPOL issued "Red Notice," and individuals with a range of violent criminal convictions.

IV. Irreparable Harm to ICE from Issuance of the Preliminary Injunction

8. I have read and am familiar with the preliminary injunction issued by the U.S. District Court for the Southern District of Texas in this case.

Inability to Prioritize Use of Finite Resources

9. On August 19, 2021, the U.S. District Court for the Southern District of Texas enjoined DHS from enforcing and implementing the policies described in: Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4); the section entitled "Civil Immigration Enforcement and Removal Priorities" in the Johnson Memorandum. (Dkt. No. 1-2 at 4–6); and the section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the Johnson Memorandum, with certain exceptions. (Dkt. No. 1-2 at 6–8). Implementing the terms of the injunction and the reporting requirements, discussed in more detail below, would be unreasonably and unduly burdensome, if not entirely impossible.

10. First, the number of noncitizens who likely would fall within the scope of the court's order and nationwide preliminary injunction significantly exceeds ICE's capacity to detain. In July of this calendar year alone, CBP apprehended a total of over 212,000 individuals seeking to cross the southwest border. *See* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited August 19, 2021). Even with over 95,000 expelled pursuant to the U.S. Centers for Disease Control and Prevention's (CDC) Title 42

authorities, over 116,000 were processed under Title 8. Another 64,000 Title 8 cases were apprehended in March; 66,000 in April; 67,000 in May; and 83,000 in June. Given these numbers and the Department's important border security mission, ERO's detention population is increasingly occupied by recent border crossers apprehended by CBP and processed pursuant to Title 8 of the U.S. Code.

11. Enforcement actions against the entire population covered by the court's order and preliminary injunction would require ICE bedspace, personnel, and other resources that simply do not exist. ERO is currently appropriated sufficient funding for approximately 34,000 detention beds nationwide, including approximately 31,500 single adult beds and approximately 2,500 family unit beds, to support its mission to enforce immigration law. ICE's access to its full inventory of bedspace is severely limited due to various court orders limiting the intake of noncitizen detainees, an increase in detention facility contract terminations, detention facility contract modifications, and the ongoing COVID-19 pandemic. Specifically, ICE's Pandemic Response Requirements (PRR) for its detention facilities, which are informed by the Centers for Disease Control and Prevention's COVID-19 guidelines, require that facilities undertake efforts to reduce populations to approximately 75% capacity.[1] Last year, the U.S. District Court for the Central District of California issued a nationwide preliminary injunction recognizing the 75% capacity limit, and ordering ICE to maintain additional strict standards to reduce the risk of COVID-19 infection. *See Fraihat v. ICE*, 445 F.Supp.3d 709 (C.D. Cal. Apr. 20, 2020). In light of these mandates, ICE's currently available bedspace inventory is only approximately 26,800 beds.

[1] ICE's Enforcement and Removal Operations COVID-19 Pandemic Response Requirements (PRR), Version 6.0 (March 16, 2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf (last visited August 19, 2021).

12. Due to this finite number of detention beds, to meet the Department's important mission, ERO must prioritize its detention resources to facilitate the detention of certain noncitizens, including those who are convicted criminals, public-safety threats, and/or recent border entrants. According to data last viewed on August 20, 2021, the currently-detained population of 25,596 noncitizens constitutes more than 95% of the approximately 26,800 currently available beds. The court's order and the preliminary injunction would make it impossible for ICE to prioritize the use of its finite detention resources to carry out its public safety and national security mission in a fair, consistent, and effective manner. Specifically, the injunction and the order would likely result in the release of noncitizens ICE has deemed priorities for removal.

13. Second, the order and the preliminary injunction could adversely impact the ability of ICE to take immediate enforcement action against noncitizens who pose a security threat or other real harm to U.S. communities. Indeed, implementation of ICE's interim priority structure has enabled the agency to focus resources on arresting and detaining the most dangerous noncitizens.

14. If ICE were required to arrest, take into custody, and detain all known noncitizens subject to detention under section 1226(c) or section 1231(a)(2) without the ability to prioritize the most serious offenders, it would significantly curtail ERO's ability to protect communities from public safety threats. And given the limited detention capacity described above, detaining such individuals may well prevent ICE from detaining other individuals not subject to detention under section 1226(c) or section 1231(a)(2), even where those individuals present a danger to the community or a flight risk.

15. Third, compliance with the nationwide preliminary injunction would adversely impact ICE's ability to plan targeted enforcement operations focused on security or public safety threats. ICE's best understanding is that there are approximately 11 million noncitizens in the United States who do not have authorization to reside here. It is critical that ICE focuses its finite law enforcement resources on its public safety mission and targeted enforcement operations like Operation SOAR (Sex Offender Arrest and Removal), a coordinated enforcement operation that builds on ongoing efforts to arrest and remove noncitizen sex offenders from our communities. Historically, ICE has used targeted operations like Operation SOAR as a mechanism to focus agency resources on the most egregious offenders in the interest of public safety, even where those offenders may not be subject to the statutory provisions at issue in this case.

16. The Johnson Memorandum focuses agency resources on enforcement actions against the most serious offenders. From February 18, 2021, through July 31, 2021, ERO processed 25,916 administrative arrests. Almost 20% of those arrests were noncitizens convicted of aggravated felony offenses. For the same period in the year 2020, ERO processed 39,107 administrative arrests. However, less than 8% of those arrests were noncitizens convicted of aggravated felony offenses.

17. Fourth, compliance with the nationwide preliminary injunction would effectively eliminate the ability of the Secretary to "[e]stablish[] national immigration enforcement … priorities" consistent with 6 U.S.C. § 202(5).. The former INS, one of DHS's predecessor agencies, exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909 to maximize use of scarce agency resources, to protect the United States from national security threats and to protect our citizens and communities from harm. *See Department of*

Justice Circular Letter Number 107, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also, e.g.,* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

18. The implementation of the enforcement priorities set forth in the DHS January 20 Memorandum and the Johnson Memorandum has assisted ERO in re-deploying assets to meet the current threat and reality. Through effective prioritization of resources, ERO is better able to adjust in real time to pressing operational needs. For example, ERO re-tasked several field operations teams to assist CBP in responding to state and local requests for assistance in the Rio Grande Valley, Del Rio, and Tucson areas to address increasing activity along the Southwest Border. Additionally, to date, approximately 300 officers have been detailed to the Southwest Border to support CBP operations. The support ERO provides at the Southwest Border includes, but is not limited to: transporting; processing; enrollment in alternatives to detention; removals; bedspace management of those taken into custody, including those subject to expedited removal proceedings pursuant to 8 U.S.C. § 1225(b); and transfers of those taken into custody. This support has significantly increased over the past few months.

19. This flexibility has enabled ERO to prioritize border security, consistent with the Johnson Memorandum, by focusing its resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States. Implementing the terms of the court's order and the preliminary injunction would likely force ERO to realign field teams and other assets to allocate limited time and resources on non-criminal and other lower priority targets. Such a reallocation would likely disrupt ERO's ability to have a meaningful impact on important border security efforts.

Lack of Clear Guidance for Nationwide Workforce

20. Absent clear priorities, ERO immigration officers may be left with only very general guidance—or without guidance at all—on the exercise of their discretion, leading to disparate prioritization across the country and a lack of consistency in enforcement actions. This could result in an undesirable shift in enforcement away from those who present the greatest risk to public safety and undermine public confidence in the nation's immigration enforcement efforts. Further, an attempt to initiate enforcement actions indiscriminately among this population, instead of against certain prioritized noncitizens, would not be an efficient or reasonable apportionment of ICE's limited resources and would likely prevent ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety.

Unduly Burdensome and Impossible Reporting Requirements

21. The court's order requires ICE to produce monthly reports stating the number of noncitizens known to be "covered by or subject to 8 U.S.C. § 1226(c)(1)(A)-(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release," and to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1226(c) reporting requirement"). The order further requires ICE to produce monthly reports stating the number of noncitizens "in their removal period as defined in 8 U.S.C. § 1231(a)(1)," along with the number of those "who were not detained pursuant to 8 U.S.C. § 1231(a)(2)," to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1231(a) reporting requirement").

22. ICE's ability to comply to the court's satisfaction with the 1226(c) reporting requirement, for instance, depends almost entirely on ICE's ability to determine whether a noncitizen is covered by or subject to § 1226(c) prior to a decision whether to take the noncitizen into custody, but that would be exceedingly burdensome or, in some instances, impossible to accomplish. When ICE receives information from a state or local law enforcement agency about a noncitizen in detention, the agency only needs probable cause of removability in order to lodge a detainer request. The probable cause standard constitutes neither a conclusive determination that a noncitizen is in fact removable nor a determination that the noncitizen may be covered by one of the statutes at issue in this case. It is only after ICE encounters the individual, assumes custody, and conducts an initial intake screening, that those formal determinations are currently made. In fact, in light of the complexities of the immigration laws, although a removability determination may be possible, a determination regarding the applicable detention authority may require obtaining and reviewing criminal records and ever-evolving developments in caselaw.
23. ICE's ability to determine whether a noncitizen in state or local custody would be covered by or subject to § 1226(c) is further limited by the fact that some states have enacted laws barring information sharing with ICE and/or prohibiting ICE access to facilities.
24. Additionally, even where ICE would be able to make determinations upfront that a noncitizen in state or local custody is covered by or subject to § 1226(c), ICE's ability to learn when a noncitizen may be released from custody is significantly limited in many jurisdictions. Many jurisdictions across the country neither honor ICE detainers nor notify ICE when inmates are released from custody. As of July 19, 2021, ICE had identified 463 jails or prisons that do not notify ICE prior to the release of a noncitizen, and 155 jails or

prisons that provide notification to ICE prior to a noncitizen's release from custody but do not provide adequate hold time for ICE to take an individual into custody. For many cases in these jurisdictions, ICE is not aware when noncitizens are released from criminal custody and has no knowledge of their last known residence. Some jurisdictions have also significantly limited ICE's access to state and local databases, which would include some of the information being sought by the court.

25. The 1231(a) reporting requirement similarly poses significant burdens for ICE and may, depending upon the court's interpretation of the requirement, apply to a very large class of individuals. There are currently an estimated 1.2 million noncitizens in the United States who have been issued final orders of removal. If the 1231(a) reporting requirement is intended to include both noncitizens who were detained at the time the order of removal became administratively final and those who were not detained, providing updated information on this population every month would significantly strain ICE's capacity to manage and track statistical data for any other purpose, including its mandatory congressional reporting requirements, statutory FOIA obligations, and myriad reporting requirements in this and other litigation.

26. The requirement that ICE make contemporaneous records of the decision not to detain will impose a serious administrative burden on the line officers making those decisions. Because of the constraints on available bedspace, the number of noncitizens subject to detention under either § 1231(a)(2) or § 1226(c) who will not be detained will likely be significant. Under the terms of the order, the line officers will be required to document that decision, thus diverting them from other important duties, including other enforcement efforts.

27. Simply put, it would be impossible for ICE to accurately and completely comply with these requirements. And it would pose extraordinary burdens on ICE to attempt to do so. ICE simply does not collect and retain data in the way that the court has requested. Moreover, with respect to noncitizens against whom no enforcement action has been taken, ICE's databases and systems do not (and cannot) capture information pertaining to the detention authority that would have applied to those noncitizens. In other words, ICE can only track the detention authority of individuals who are presently in ICE custody. Even then, ICE systems are not designed to capture the level of granularity needed to accurately report the number of noncitizens subject to § 1226(c) mandatory custody or the subset of noncitizens subject to § 1231(a) custody authority for whom custody is mandatory.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 20th day of August, 2021.

PETER B BERG

Digitally signed by PETER B BERG
Date: 2021.08.20 23:13:13 -04'00'

Peter B. Berg
Acting Deputy Executive Associate Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

Exhibit G

Homeland Security

Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law

September 30, 2021

Introduction

On January 20, 2021, President Biden issued Executive Order 13993, 86 Fed. Reg. 7051, *Revision of Civil Immigration Enforcement Policies and Priorities*.[1] The Executive Order established that the policy of the Biden-Harris Administration is to "protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety." The Executive Order also committed to adhering to "due process of law as we safeguard the dignity and well-being of all families and communities." In order to better align with these values and priorities, the Executive Order revoked Executive Order 13768, 82 Fed. Reg. 8799, promulgated on January 25, 2017, and called for a "reset" of the "policies and practices for enforcing civil immigration laws."[2]

Also on January 20, 2021, then-Acting Secretary David Pekoske issued a memorandum (the "Pekoske Memorandum") calling for a comprehensive review of the Department of Homeland Security's (the "Department" or "DHS") immigration enforcement policies and priorities and establishing civil immigration enforcement guidelines.[3] By its terms, the Pekoske Memorandum contemplated issuance of revised policies following such a review. On February 18, 2021, U.S. Immigration and Customs Enforcement ("ICE") Acting Director Tae Johnson issued interim guidance (the "Johnson Memorandum") to all ICE employees in support of the interim priorities contained in the Pekoske Memorandum and making certain approved revisions.[4]

The Pekoske and Johnson Memoranda have been challenged in four different lawsuits, two of which were dismissed by district courts on the grounds that the memoranda are not subject to judicial review and one of which remains pending in the Southern District of Texas.[5] In the fourth suit brought by the states of Texas and Louisiana, a federal judge in the Southern District of Texas on August 19, 2021, issued a preliminary injunction enjoining the Department from

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[1] Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities,* 86 Fed. Reg. 7051 (Jan. 20, 2021), available at https://www.federalregister.gov/documents/2021/01/25/2021-01768/revision-of-civil-immigration-enforcement-policies-and-priorities.

[2] *Id.*

[3] 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).

[4] Memorandum from Tae Johnson, Acting Dir. of U.S. Immigr. and Customs Enf't, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021).

[5] *Arizona v. Dept. of Homeland Sec.,* Case No. 21-cv-186 (D. Ariz.); *Florida v. United States*, Case No. 21-cv-541 (M.D. Fla.); *Coe v. Biden*, Case No. 21-cv-168 (S.D. Tex.).

enforcing and implementing the enforcement guidelines contained in both memoranda. *Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021). On September 15, 2021, the Fifth Circuit Court of Appeals stayed the district court's injunction in most respects while the government's appeal is pending but left the injunction in place insofar as it "prevents DHS and ICE officials from relying on the memos to refuse to detain aliens described in [8 U.S.C. §] 1226(c)(1) against whom detainers have been lodged or aliens who fall under section 1231(a)(1)(A) because they have been ordered removed." *Texas v. United States*, --- F.4th ---, 2021 WL 4188102, *7 (5th Cir. Sept. 15, 2021).

In so ruling, the Fifth Circuit emphasized 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 *6, and reaffirmed the Supreme Court's holding that law enforcement discretion extends throughout the removal process, including to the discretionary decision of whether to "abandon the endeavor." *Id.* at *4 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999)).

Over the past seven months, the Secretary and Department personnel have held numerous engagements with internal and external stakeholders and have closely monitored the implementation of the Pekoske and Johnson Memoranda. The Secretary's *Guidelines for the Enforcement of Civil Immigration Law*, issued today on September 30, 2021, reflect the information collected throughout this period as well as the Secretary's own experience as a career public servant, including 12 years as a federal prosecutor, three years of which as the United States Attorney for the Central District of California, and more than 7 years as Deputy Secretary of Homeland Security and Director of U.S. Citizenship and Immigration Services. This document contains a summary of the considerations informing the guidelines being issued today.

Prosecutorial and Enforcement Discretion in the Immigration Context

History of Immigration Enforcement Policies and Priorities

"A principal feature" of the Nation's immigration laws "is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). This discretion derives not only from the U.S. Constitution, which vests enforcement authority in the Executive Branch, but also from the immigration laws themselves. *See, e.g.*, 6 U.S.C. § 202(5) (expressly directing the Secretary to "[e]stablish national immigration enforcement policies and priorities").

For over a century, the Executive has exercised discretion to prioritize which noncitizens to arrest, detain, or remove. For example, as far back as 1909, the Immigration and Naturalization Service ("INS"), which then handled many of the immigration-enforcement functions now handled by DHS, had a prosecutorial-discretion policy directing that officers generally would not have good cause to initiate proceedings to cancel a fraudulent or illegally procured naturalization certificate "unless some substantial results are to be achieved thereby in the way of betterment of

the citizenship of the country."[6] And in 1976, the INS General Counsel issued a legal opinion providing broader policy guidance on the exercise of prosecutorial discretion.[7]

In 2000, INS Commissioner Doris Meissner issued a memorandum to senior INS officials on the exercise of prosecutorial discretion (the "Meissner Memorandum").[8] The Meissner Memorandum adopted a "totality of the circumstances" approach to immigration enforcement that was guided by a non-exhaustive list of both positive and negative factors (*e.g.*, immigration status, length of residence in the United States, criminal history, current or future eligibility for relief from removal).[9] The memorandum expressly provided that "service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process" and that it is "appropriate and expected that the INS will exercise [prosecutorial discretion] authority in appropriate cases."[10] It also directed officers to "take into account the principles described [in the memorandum] in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice."[11] Ultimately, determinations were committed to "the exercise of judgment by the responsible officer" who was "encouraged," but not required, to seek supervisor input in "questionable cases."[12]

The Meissner Memorandum provided the primary guidance for immigration officers' exercise of prosecutorial discretion for nearly a decade.[13] In June 2010, ICE Director John Morton issued a memorandum to all ICE employees (the "Morton Memorandum") identifying categories of individuals who should be prioritized for enforcement, with the highest priority being noncitizens who pose a danger to national security or public safety (including individuals convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders, as well as those who otherwise pose a serious risk to public safety), and the secondary priorities being recent illegal entrants and individuals with prior orders of removal.[14] With respect to prioritizing the removal of individuals with criminal convictions, the national security and public safety priority identified three priority levels: (1) aggravated felons and noncitizens with multiple felonies; (2) noncitizens with a single felony or three or more misdemeanors; and (3) noncitizens with a misdemeanor conviction.[15]

In June 2011, Director Morton issued a second memorandum on the exercise of prosecutorial discretion that eschewed the priorities-based approach in his earlier memorandum and instead followed the same basic structure as the Meissner Memorandum: vesting line officers with broad discretion and instructing them to consider the totality of the circumstances, guided by a long list

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[6] *Department of Justice Circular Letter Number 107*, dated Sept. 20, 1909.
[7] *See* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).
[8] Memorandum from Doris Meissner, Comm'r, INS, *Exercising Prosecutorial Discretion* (Nov. 17, 2000).
[9] *Id.* at 7–8.
[10] *Id.* at 5–7.
[11] *Id.*
[12] *Id.* at 5, 9, 11.
[13] In 2005, the ICE Principal Legal Advisor issued a memorandum providing guidance for when ICE attorneys within the Office of the Principal Legal Advisor could join in or file motions to dismiss proceedings without prejudice in immigration court to permit noncitizens to request adjustment of status before USCIS.
[14] Memorandum from John Morton, ICE Dir., *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Jun 30, 2010), 1–2.
[15] *Id.* at 2.

of positive and negative equities.[16] This memorandum also included a second list of positive and negative factors requiring "particular care."[17]

In 2014, Secretary of Homeland Security Jeh Johnson issued a memorandum (the "Jeh Johnson Memorandum") that exercised discretion at the policymaking level of the Secretary and additionally vested significant authority in the hands of field office leadership to direct exercises of prosecutorial discretion.[18] The Jeh Johnson Memorandum established three priority categories:

1. Threats to national security, border security, and public safety;

2. Misdemeanants and new immigration violators; and

3. Other immigration violations.

With respect to individuals who fell within these priority categories, the memorandum encouraged the exercise of prosecutorial discretion based on a "totality of the circumstances" approach guided by an enumerated list of considerations.[19] The Jeh Johnson Memorandum further specified that immigration officers may pursue removal of individuals outside the established priorities where, "in the judgment of an ICE Field Office Director, removing such [a noncitizen] would serve an important federal interest."[20] This requirement echoes language provided in the Meissner Memorandum, which referenced the Principles of Federal Prosecution governing the conduct of U.S. Attorneys to explain that "[a]s a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial."[21] The Jeh Johnson Memorandum excluded from the priority categories: (1) individuals with one or two misdemeanor convictions, with the exception of those described as "significant misdemeanors" based on the nature of the offense and length of time the individual was sentenced to serve in custody; and (2) individuals with prior orders of removal entered before 2014.[22]

At the beginning of the last Administration, President Trump issued Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*,[23] which purported to diverge from the longstanding use of prioritization schemes to guide the exercise of enforcement discretion. Contrary to prior guidance, Executive Order 13768 stated that, with limited exceptions, "[i]t is the policy of the executive branch to … ensure the faithful execution of the immigration laws … against *all removable aliens*," and specifically directed "agencies to employ all lawful means to

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[16] Memorandum from John Morton, ICE Dir., *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011).
[17] *Id.* at 5.
[18] Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).
[19] *Id.* at 5–6.
[20] Jeh Johnson Memorandum at 5.
[21] Meissner Memorandum at 5.
[22] *Id.* at 3–4.
[23] Exec. Order 13768, *Enhancing Public Safety in the Interior of the United States*, 59 Fed. Reg. 8799 (Jan. 25, 2017).

ensure the faithful execution of the immigration laws … against *all removable aliens*."[24] Insofar as the Executive Order established enforcement priorities, it identified large categories of people subject to inadmissibility and deportability grounds, as well as an expansive list of characteristics that effectively described all removable noncitizens. The same "enforcement priorities" were contained in an implementation memorandum issued on February 20, 2017, by Secretary of Homeland Security John Kelly (the "Kelly Memorandum"), which officially rescinded the Jeh Johnson Memorandum.[25]

In short, the prior Administration did away with notable features of enforcement priorities memoranda from the prior two decades, including: (1) tiered priority groups; (2) positive and negative factors guiding discretionary deviations from the priorities; (3) distinctions among different criminal convictions and records based on seriousness and similar considerations; (4) the general focus on individuals convicted of crimes, as opposed to those merely charged with crimes or who may have "committed acts which constitute a chargeable criminal offense;"[26] and (5) some degree of supervisory review of exercises of prosecutorial discretion. At the same time, however, the prior Administration did not actually initiate or pursue removal proceedings against all removable noncitizens, arrest or detain all potentially detainable noncitizens, or remove all noncitizens with final orders of removal—nor could the Administration have done so, in light of available resources. Instead, the prior Administration effectively delegated prioritization decisions to individual line agents, without necessary training or guidance to steer the exercise of this discretion, raising the potential for contradictory and unfair enforcement of the immigration laws across the system and undermining the Executive's ability to focus resources on a systemwide level on pursuing enforcement against the noncitizens who pose the greatest threats to safety and security.

Resource Limitations Necessitating Enforcement Priorities

The need to make smart and strategic choices about how to utilize the limited resources provided by Congress is a common theme in many of the Department's prosecutorial discretion and enforcement priorities guidelines across administrations.[27] DHS has insufficient resources to

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[24] *Id.* (emphases added).

[25] Memorandum from John Kelly, Sec'y of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).

[26] *Id.* at 2.

[27] Meissner Memorandum at 4 ("Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals."); Morton Memorandum at 1 ("In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security."); Jeh Johnson Memorandum at 2 ("Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities."); Kelly Memorandum at 2 ("The Director of ICE, the Commissioner of CBP, and the Director of USCIS may, as they determine is appropriate, issue further guidance to allocate appropriate resources to prioritize enforcement activities within these categories—for example, by prioritizing enforcement activities against removable aliens who are convicted felons or who are involved in gang activity or drug trafficking.").

conduct immigration enforcement against *all* of the more than 11 million undocumented or otherwise removable noncitizens estimated to be in the country today or to efficiently and effectively remove the more than one million noncitizens who already have final orders of removal. Further, immigration enforcement often touches upon foreign affairs, which must be taken into account in certain enforcement contexts. This consideration is especially salient in the context of executing removal orders, where there is a need to work with foreign countries to accept the return of individuals ordered removed. Foreign-affairs concerns often necessitate expending significant resources when trying to remove certain noncitizens who pose serious threats to public safety and national security. But while prioritization is a long-standing practice in immigration and law enforcement, the resource constraints DHS and its components face in the civil immigration enforcement context have increased dramatically over the years. As a result, the need for thoughtful enforcement priorities that effectively focus the Department's resources on the cases most important to the national interest is especially vital today.

In recent years, the United States has faced a significant, ongoing enforcement and humanitarian challenge at the border. Even before this, the government agencies involved in immigration enforcement, including ICE, CBP, and the Executive Office for Immigration Review (EOIR) within the Department of Justice, were faced with significant resource challenges. For example, while the number of removal proceedings pending in immigration court grew from 262,757 cases in 2010 to 1,328,413 at the end of the third quarter in fiscal year 2021—an increase of more than 400% in a little over a decade—the annual number of case completions has remained largely flat.[28] Much of the growth in the immigration court backlog took place over the course of the last Administration, when the Department operated under that Administration's stated policy that all removable noncitizens should be removed. Between the end of Fiscal Year 2016 and the end of Fiscal Year 2020, the number of pending cases increased from 521,526 to 1,260,039.[29]

ICE, too, faces significant resource challenges for myriad reasons. At present, ICE's approximately 6,500 Enforcement and Removal Operations officers manage a docket of more than 3 million noncitizens either in removal proceedings or subject to orders of removal. Beyond funding constraints, ICE's detention capacity is currently limited by pending litigation and COVID-19 considerations. In total, ICE has sufficient appropriations to fund approximately 34,000 detention beds; in light of those additional constraints, however, ICE presently has the ability to detain approximately 26,800 noncitizens at any given time—less than 1% of the number in removal proceedings or subject to orders of removal.

The ICE Office of the Principal Legal Advisor (OPLA), which is responsible for representing DHS in removal proceedings, is similarly resource-constrained, further illustrating the need for resource prioritization in enforcement. Although the immigration court docket has grown dramatically in the last decade (as discussed above), OPLA has not received sufficient additional appropriations to grow with that docket. Consequently, OPLA currently has hundreds fewer attorneys than it would need to adequately support the workload associated with the current number of pending removal proceedings. As a result, OPLA faces serious constraints on its ability to meaningfully prepare for all cases set for hearings or even attend every such hearing.

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[28] Executive Office for Immigration Review Adjudication Statistics, Pending Cases, New Cases, and Total Completions, available at www.justice.gov/eoir/workload-and-adjudication-statistics.
[29] *Id.*

These challenges and limitations, particularly in light of the lack of meaningful prioritization during the previous Administration that contributed to the significant growth in both ICE and EOIR's caseloads, make it impossible for OPLA to effectively manage its work without thoughtful prioritization policies and the exercise of discretion.

These severe constraints underscore the importance of exercising enforcement discretion in a manner that focuses the agency's efforts on those noncitizens who pose the greatest threat to national security, public safety, and border security. These prioritization decisions should also be informed by the values of the enforcement agency and the Nation. In remarks delivered at the Second Annual Conference of United States Attorneys more than 80 years ago, Attorney General Robert H. Jackson said:

> Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.[30]

On his first day in office, President Biden affirmed that "advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government."[31] In the immigration enforcement context, scholars and professors have observed that prosecutorial discretion guidelines are essential to advancing this Administration's stated commitment to "advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."[32]

The use of prosecutorial discretion to advance the interests of justice is built upon years of precedent. As mentioned above, the Meissner Memorandum in 2000 instructed that "[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process" and directed that "officers *must* take into account the principles described [in the memorandum] in order to promote the efficient and effective enforcement of the immigration laws *and the interests of justice*."[33] As mentioned above, the Jeh Johnson Memorandum in 2014 authorized enforcement outside the established priorities where, "in the judgment of an ICE Field Office Director, removing such [a noncitizen] would serve an important federal interest."[34] The Meissner Memo 14 years earlier referenced the Principles of Federal Prosecution governing the conduct of U.S. Attorneys to explain that "[a]s a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial."[35]

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[30] Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18–19 (1940).
[31] Exec. Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Jan. 20, 2021).
[32] *Id.*
[33] Meissner Memorandum at 1 (emphasis added).
[34] Jeh Johnson Memorandum at 5.
[35] Meissner Memorandum at 5.

More recently, ICE Principal Legal Advisor John Trasviña issued guidance to trial attorneys aptly explaining that

> Prosecutorial discretion is an indispensable feature of any functioning legal system. The exercise of prosecutorial discretion, where appropriate, can preserve limited government resources, achieve just and fair outcomes in individual cases, and advance the Department's mission of administering and enforcing the immigration laws of the United States in a smart and sensible way that promotes public confidence.[36]

Moreover, the Board of Immigration Appeals explained in an en banc decision that "[i]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done."[37]

These sentiments are also reflected in recommendations on prosecutorial discretion advanced by NGO advocates for noncitizens. For example, the We Are Home Campaign[38] has encouraged the exercise of prosecutorial discretion to ensure that the interests of justice are met for people exercising workplace rights or serving as witnesses in labor disputes; people engaged in civil, faith, housing, First Amendment, and other human rights activities; and victims and witnesses in civil, administrative, or criminal proceedings, among others. Advocates argue that strict application of our immigration laws without considerations such as these risks perverse outcomes, unjust results, and diminished confidence in the rule of law.

The Biden-Harris Administration's Approach to Immigration-Enforcement Priorities

Interim Civil Immigration Enforcement Policies and Priorities

In line with historical practice and in full recognition of the resource constraints that require the use of civil immigration enforcement priorities to guide the workforce, on January 20, 2021, Acting Secretary David Pekoske issued a memorandum, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*. The Pekoske Memorandum called for a comprehensive review of enforcement policies and priorities and immediately rescinded and superseded several prior policies, including a February 20, 2017, memorandum establishing the Department's previous enforcement priorities, as well as various implementing memoranda issued by components. The memorandum additionally established and defined three Department-wide 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.

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[36] Memorandum from John Trasviña, ICE Principal Legal Advisor, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021).
[37] *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) (en banc).
[38] We Are Home Campaign, *Recommendations for the Use of Prosecutorial Discretion* (June 16, 2021).

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.[39]

Although the memorandum directed that resources be allocated to address these enumerated priorities, it specified that "nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein," and explicitly disclaimed any notion that the guidelines and priorities may be relied upon to create any enforceable right or benefit.[40]

On February 18, 2021, Acting ICE Director Tae Johnson issued a memorandum that both supported the interim priorities laid out in the Pekoske Memorandum and modified them in certain respects. Importantly, the Johnson Memorandum made clear that at-large enforcement actions of presumed-priority individuals could be taken without prior approval,[41] and that individuals who are not presumed priorities may nevertheless be subject to apprehension and removal—under some circumstances, even in the absence of prior approval—if they pose a threat to public safety. The Johnson Memorandum directed ICE field offices to collect data on enforcement and removal actions, both to promote compliance with the guidance and consistency across geographic areas of responsibility, and to inform the development of new Departmental enforcement guidance. Some of the findings from that data are discussed further below.

Litigation Challenging Immigration Enforcement Guidance in the Pekoske and Johnson Memoranda

The immigration enforcement guidance contained in the Pekoske and Johnson Memoranda have been challenged in four separate lawsuits.[42] One suit, which was filed by Texas and Louisiana, contends that the memoranda run afoul of the Administrative Procedure Act (APA) because they violate the Department's duty to detain certain individuals pursuant to 8 U.S.C. §§ 1226(c) and 1231(a)(2), are arbitrary and capricious, and are agency rules that must be adopted following notice and comment. Other lawsuits filed by Florida, Arizona, and Montana, and various local

[39] *Id.* at 2. The Pekoske Memorandum additionally announced a 100-day pause on certain removals that was enjoined.
[40] *Id.* at 3-4.
[41] The Johnson Memorandum expanded the category of presumed public safety threats to include certain individuals who are qualifying members of criminal gangs or transnational criminal organizations.
[42] *See Arizona, et al. v. United States, et al.*, No. 2:21-cv-186 (D. Ariz.); *Coe, et al. v. Biden, et al.*, No. 3:21-cv-168 (S.D. Tex.); *Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fla.); *Texas, et al. v. United States, et al.*, 6:21-cv-00016 (S.D. Tex.).

governments and an association of ICE officers raise similar claims focusing on a variety of detention provisions, including 8 U.S.C. §§ 1225(b), 1226(c), and 1231(a)(1).

On August 19, 2021, a federal district court issued an opinion ruling in favor of Texas and Louisiana on their APA claims and preliminarily enjoining the Department from enforcing and implementing Section B of the Pekoske Memorandum and the operative part of the Johnson Memorandum, which provide guidance on the implementation of the Department's civil immigration enforcement and removal priorities. On September 15, 2021, the Fifth Circuit Court of Appeals largely stayed the district court injunction pending appeal in an opinion that reaffirmed the "broad discretion" entrusted to immigration officials—including with respect to "who should face enforcement action in the first place," *Texas*, 2021 WL 4188102 at *3 (quoting *Arizona*, 567 U.S. at 396)—that was, with limited exceptions, left unencumbered by the detention authorities found at 8 U.S.C. §§ 1226(c) and 1231(a)(2). The court's decision was grounded in the fact that policies such as these that are entrusted to agency discretion by law are generally nonreviewable under the APA. And district courts in the Florida and Arizona and Montana lawsuits similarly concluded that the States' claims were unreviewable because the prioritization of enforcement actions is committed to agency discretion by law.

In arguing that the adoption of the Pekoske and Johnson Memoranda violated the APA because they were arbitrary and capricious and ignored statutory mandates, the plaintiffs in these suits have focused on a series of concerns that they alleged the Department failed to consider when crafting the policies. The district court that enjoined the memoranda similarly pointed to a number of these considerations in its analysis. These concerns ranged from the adequacy of the Department's consideration of whether the memoranda would enhance public safety and appropriately address the risk of recidivism by noncitizens convicted of criminal offenses; the costs that states would allegedly bear as a result of enforcement decisions made in reliance on the memoranda (e.g., costs related to additional incarceration, post-release supervision, and education, health care, and social services); how deciding not to detain certain individuals during the pendency of removal proceedings could affect future removal efforts, adding costs tied to delays and increasing the rate of abscondment; and how the priorities would interact with various statutory enforcement and detention mandates.

Listening Sessions to Help Evaluate Interim Priorities and Develop Updated Guidance

Throughout the past year, Department officials engaged in multiple discussions with leadership from ICE, USCIS, and CBP, as well as ICE personnel in the multiple field locations. Department officials also met with external stakeholders, including law enforcement groups, state and local government representatives, and non-governmental entities, including immigrant advocacy organizations. These conversations helped the Department evaluate its interim immigration enforcement and removal priorities and properly understand and consider the various interests of both internal and external stakeholders, thereby ensuring that the Department's development of new priorities was informed by all of the relevant evidence and interests.

Over the course of four listening sessions with representatives from the National Sheriffs' Association, the Southwest Border Sheriffs' Coalition, the Major Cities Chiefs Association, the U.S. Conference of Mayors, the National Association of Counties, and others, participants talked

about the types of criminal offenses that pose threats to public safety and should be prioritized by ICE. Many suggested replacing the "aggravated felony" language in the interim priorities. Some suggested a list that was untethered to the definition of "aggravated felony" and could include sexual assault crimes, crimes against children, gang and drug activities, violent crimes, and property crimes for repeat offenders. Several participants recommended that the recency of the offense should also be a factor.

Internal engagements similarly revealed interest from some ICE personnel to have greater discretion to arrest a wider range of individuals. Some appeared to understand the "presumed priority" categories in the interim enforcement guidance as restrictive mandates rather than presumptions that can be overcome. Other personnel expressed a desire for more specificity – for instance, by defining "border security" using parameters that are clearly identifiable (e.g. "entered the United States within two years").

Conversely, NGO advocates for noncitizens, representatives of state and local governments, and other stakeholders observed that under the existing framework, individuals falling outside the presumed priority categories are frequently arrested and removed. The resulting uncertainty, created by the possibility of enforcement outside of the presumed priorities, meant that individuals were fearful. Many warned that such fear can chill victim participation in law enforcement investigations and deter noncitizens from COVID-19 testing and vaccination. Some of these stakeholders also expressed concern that DHS personnel are determining individuals to be "public safety" threats based on single interactions with the criminal justice system, sometimes many years ago, without additional derogatory information or further assessment.

Finally, representatives of immigrant workers and labor unions observed that employers in certain industries sometimes seek to leverage immigration-enforcement actions (or the threat of them) to quash worker organizing or to dissuade workers from asserting their rights. These views were echoed by some mayors and police chiefs, who expressed concerns that ICE's enforcement activities and reputation may deter victims and witnesses from contacting public safety authorities. These groups suggested that ICE could ameliorate this problem by engaging in better public communication, curtailing certain enforcement practices, or a combination of both.

Discussion of Key Considerations

Public Safety Considerations

Public safety has long been a central focus of DHS (and, previously, INS), and it has been a key feature of multiple past guidance memoranda on enforcement priorities. Under the Pekoske Memorandum, the public safety threat category includes "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." The Johnson Memorandum expands that presumed priority category to apply more generally to noncitizens who pose a threat to public safety and who have been convicted of an aggravated felony, convicted of an offense involving participation with a criminal street gang, or who have certified specified ties to criminal street gangs or transnational criminal

organizations. The Johnson Memorandum additionally clarifies that, generally with prior approval, any noncitizen who poses a threat to public safety may be deemed an enforcement priority even if they do not fall within the categories of individuals presumed to be such a priority, and specifies a variety of relevant factors to be considered, including "the nature and recency of the noncitizen's convictions, the type and length of sentence imposed, [and] whether the enforcement action is otherwise an appropriate use of ICE's limited resources."

In the Department's engagements with internal and external stakeholders, including with the ICE workforce, concerns were raised about whether the focus on individuals convicted of "aggravated felonies" was both over- and under-inclusive. The aggravated felony definition can be challenging to administer in many instances; its various elements are subject to evolving definition by the Board of Immigration Appeals and the federal courts. Moreover, the "aggravated felony" category is an imperfect proxy for severity of offense. On the one hand, aggravated felonies may include certain crimes unlikely to be indicative of a public safety threat, such as certain drug possession offenses or filing a false tax return. On the other hand, certain offenses more likely to support a public safety threat finding—including, for example, certain murder and sex offenses—may not qualify as aggravated felonies based on the specific way in which a particular criminal statute is worded. In designing a new public safety enforcement priority category, the Department considered these concerns and chose to place greater emphasis on the totality of the facts and circumstances that inform whether an individual poses a current threat to public safety—typically because of serious criminal conduct—including by looking at key aggravating factors related to the individual's criminal offense and history as well as various mitigating factors.

The approach taken in the guidelines to public safety threats also addresses a central concern raised by the Texas district court in its ruling that the Pekoske and Johnson Memoranda were unlawfully arbitrary and capricious because they chose to focus enforcement efforts on "merely *some* criminal illegal aliens—those with aggravated felonies and criminal gang affiliations." *Texas*, 2021 WL 3683913 at *47. The district court stated that the Department ignored a supposed "well-established concept that *all* criminal illegal aliens or 'deportable aliens pose high risks of recidivism.'" *Id.* (citing *Demore v. Kim*, 538 U.S. 510, 518 (2003)). The updated guidance addresses the district court's concern by calling for a context-specific consideration of aggravating and mitigating factors, the seriousness of an individual's criminal record, the length of time since the offense, and evidence of rehabilitation. These factors are to be weighed in each case to assess whether a noncitizen poses a current threat to public safety, including through a meaningful risk of recidivism.

There is no question that enhancing public safety is an appropriate priority for the Department. In fact, it is an imperative, given the Department's mission. Executive Order 13993 directed DHS to issue enforcement guidance, in alignment with the Administration's policy to "protect national and border security, … and ensure public health and safety." This aim is furthered by a prioritization scheme that directs civil immigration enforcement resources towards apprehending and removing those individuals who are likely to present the greatest risks to public safety: individuals who are convicted of particularly grave offenses that cause significant harm, individuals who commit an offense while using or threatening to use a firearm or other dangerous weapon, individuals who have a serious prior criminal record, and individuals who, in

light of their actions and circumstances, are unlikely to rehabilitate. While it is impossible to predict with certainty in each case whether a particular individual will re-offend, the Department has exercised its expert judgment and experience to identify those factors that make an offender particularly more likely or less likely to recidivate. And the Department's judgments regarding these factors are further supported by evidence developed by the United States Sentencing Commission, which demonstrates that reconviction rates drop off significantly for individuals who are crime-free for 5 years post-release, those sentenced to 6 months or less of imprisonment, and those who were 40 or older when released.[43]

In working to achieve its public safety goal, the Department has frequently made distinctions between individuals based on the nature of their convictions and conduct. This approach is further supported by the academic literature, which points to a negative relationship between immigration and crime (i.e., that as immigration increases, crime rates decrease).[44] These findings are further bolstered by micro-level research that generally finds lower criminal involvement by foreign-born individuals, relative to their native-born counterparts.[45] The Texas district court's reference to the "well-established" propensity for certain removable noncitizens to recidivate does not appear to be grounded in empirical data, at least in part because legal status is not generally collected by law enforcement agencies. Where status information has been made available—including in the state of Texas itself—the evidence indicates that undocumented noncitizens are *less* likely to recidivate.[46]

Additionally, it is a mistake to assume that the threat that an individual poses to public safety can be reduced to simply the question of whether the individual is likely to recidivate. Not all offenses present the same risk to public safety. As a result, while an individual with a substance abuse addiction may be highly likely to recidivate and be convicted again for a simple controlled substance offense, that individual may pose a smaller risk to public safety than an individual who has committed a recent violent assault. Law enforcement decisions such as these require consideration of the totality of circumstances, looking at the individual facts presented and both aggravating and mitigating circumstances and weighing all of those facts and circumstances in light of agency officials' informed judgment and experience.

Deconfliction Considerations

The Department has long recognized that civil immigration enforcement activity may have adverse effects on the enforcement of other laws. Law enforcement officials may have difficulty engaging noncitizen victims and witnesses in criminal investigations, if such victims and witnesses are potentially subject to removal. Likewise, efforts of agencies enforcing our labor

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[43] United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, (Mar. 2016) Table 2, Figure 10, Figure 6, respectively, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

[44] Graham C. Ousey and Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, Annual Review of Criminology, https://www.annualreviews.org/doi/abs/10.1146/annurev-criminol-032317-092026.

[45] Jacob Stowell and Stephanie DiPietro, *Ethnicity, Crime, and Immigration in the United States Crimes By and Against Immigrants*, The Oxford Handbook of Ethnicity, Crime, and Immigration, 2014.

[46] Michael T. Light, et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, Proceedings of the National Academy of Sciences of the USA, (Dec. 12, 2020), available at https://www.pnas.org/content/117/51/32340.

laws may be frustrated if noncitizen workers are disinclined to report violations of wage, workplace safety and other standards. It does not serve the public interest when these rights go unvindicated, or when crimes go unprosecuted. The Department has, over the years, adopted some policies to address elements of these challenges, some applicable to certain contexts, and some to specific components of the Department. In 2011 the Department entered into a memorandum of understanding with the Department of Labor to ensure that the Departments work together to ensure that their respective civil worksite enforcement activities do not conflict.[47] Consistent with those concerns, the Department believes it is important that the guidelines being issued today convey clearly to various stakeholders, including the public generally and agencies that conduct investigations, that a particular noncitizen's use of, or cooperation with, civil and criminal enforcement authorities will generally be considered a mitigating factor in connection with enforcement decisions (even though such a mitigating factor may be outweighed by aggravating factors based on the particular facts and circumstances of the particular case).

Impact on States

The State-plaintiffs in several of the lawsuits alleged that the Department failed to consider the additional costs that States would incur as a result of the Pekoske and Johnson Memoranda and failed to consider whether the States had any reliance interests on the previous Administration's prioritization scheme. For instance, Texas alleged that it would incur additional criminal incarceration costs due to the Department's change in enforcement priorities because some noncitizens who would otherwise have been detained will now be released and may commit new criminal violations. *Texas*, 2021 WL 3683913 at *12. Texas additionally asserted that because some noncitizens are released from detention and, as a result, are less likely to be removed from the country, the state would bear additional healthcare costs such as those provided through Emergency Medicaid, the Texas Family Violence Program, and the Texas Children's Health Insurance Program, as well as additional educational costs for educating the children of such noncitizens. Louisiana alleged that it would incur similar costs. In its order enjoining the implementation and enforcement of the memoranda, the federal district court concluded that "the Memoranda bear no thought or indication as to whether the new prioritization scheme minimizes and limits state costs due to crime." *Id.* at *50.

In the Department's considered judgment, none of the asserted negative effects on States—either in the form of costs or the form of undermining reliance interests—from adopting a prioritization scheme outweighs the benefits of the scheme. As an initial matter, any immigration policy may have indirect, downstream impacts on a significant number of actors—including, potentially, State governments, businesses, and individual citizens—and the Department, regardless of Administration, cannot provide an exhaustive analysis of all of these potential impacts every time it adopts a change in immigration policy. The Department endeavors to consider the predictable (and measurable) impacts that its policies may have on those most directly affected by those policies.

[47] Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, Dec. 7, 2011, available at https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf.

Further, an assessment of any potential impacts on State governments is uniquely difficult to conclude with certainty. As the Department explained recently in the Notice of Proposed Rulemaking regarding the Deferred Action for Childhood Arrivals policy, it is challenging to measure the overall fiscal effects of enforcement priorities guidance on state and local governments.[48] This is in large part due to those governments' budgetary control, and the reality that any fiscal consequences are driven by policy decisions that state and local governments are themselves making. The 2017 National Academy of Sciences report canvassed studies of the fiscal impacts of immigration as a whole, and described such analysis as extremely challenging and dependent on a range of assumptions.[49]

In addition, while second-order effects also clearly occur, analysis of such effects similarly presents methodological and empirical challenges. For example, as with the native-born population, the age structure of the noncitizen demographic plays a major role in assessing any fiscal impacts. Children and young adults contribute less to society in terms of taxes and draw more in benefits by using public education, for example. As people age and start participating in the labor market they become net contributors to public finances; those in post-retirement again could become net users of public benefit programs. Compared to the native-born population, noncitizens also can differ in their characteristics in terms of skills, education levels, income levels, number of dependents in the family, the places they choose to live, etc., and any combination of these factors could have varying downstream fiscal impacts. As noted above, local and state economic conditions and laws that govern public finances and availability of public benefits also vary and can influence the fiscal impacts of immigration.

Based on the information presented in the 2017 NAS report, DHS has approached the question of state and local fiscal impacts as follows. First, it is clear that the fiscal impacts of proposed policies to state and local governments would vary based on a range of factors, such as the demographic characteristics of the affected population within a particular jurisdiction at a particular time (or over a particular period of time). In addition, fiscal effects would vary significantly depending on local economic conditions and the local rules governing eligibility for public benefits, detention costs, and other laws and practices. These costs to states and localities will be highly location-specific and are, therefore, difficult to quantify.

Second, in the Department's experience and judgment, there is good reason to believe that any effects from implementation of priorities guidance are unlikely to be significant, and could have a net positive effect. Under no circumstance—including under a framework that effectively sets no enforcement priorities—will DHS be able to arrest, detain, or remove more than a fraction of the overall removable population. Without a dramatic change in the level of resources, most

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[48] *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53,736, 53,801–02 (Sept. 28, 2021).

[49] *See* NAS, *The Economic and Fiscal Consequences of Immigration* (2017), 28, available at https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration ("[E]stimating the fiscal impacts of immigration is a complex calculation that depends to a significant degree on what the questions of interest are, how they are framed, and what assumptions are built into the accounting exercise. The first-order net fiscal impact of immigration is the difference between the various tax contributions immigrants make to public finances and the government expenditures on public benefits and services they receive. The foreign-born are a diverse population, and the way in which they affect government finances is sensitive to their demographic and skill characteristics, their role in labor and other markets, and the rules regulating accessibility and use of government-financed programs.").

noncitizens who are removable will likely remain in the country. This is, of course, not a new phenomenon. According to 2018 estimates by the Migration Policy Institute, approximately three-in-five undocumented noncitizens in the United States had lived in the country for at least 10 years.[50] Additionally, as the Department heard from multiple stakeholder engagements, including with law enforcement partners and local government officials, a civil immigration enforcement framework that lacks clear priorities is likely to increase fear and sow mistrust between noncitizens and government. Such an environment can breed "hesitancy in accessing services, relief, and even vaccines during the COVID-19 pandemic."[51] Likewise, states and localities benefit from civil immigration enforcement policies that are more likely to lead to the arrest and removal of individuals who are threats to public safety.

Finally, even if the Department's guidelines for the enforcement of civil immigration laws have indirect fiscal impacts on states, that is no different from countless other policy decisions that Federal agencies make every day, including decisions by other law enforcement entities regarding where to focus their limited enforcement resources. Enforcement decisions made by the Department of Justice Civil Rights Division and the Environmental Protection Agency can have profound fiscal impacts on states and localities, but those actions are nevertheless pursued when they advance the important mission of those Federal agencies. For the Department of Homeland Security to achieve its critical mission, it similarly must set sensible priorities for the enforcement of the Nation's civil immigration laws and to guide the exercise of prosecutorial discretion.

Similarly, with respect to reliance interests, the Department has considered whether any States or other third parties may have valid reliance interests invested in the previous Administration's priorities scheme or in the scheme developed by the interim guidance. In the Department's view, no such reasonable reliance interests exist, both because the Department is unaware of any State that has materially changed its position to its detriment as a result of those previous policies and because any such change by any party would be unreasonable in light of the long history of the Executive's use of evolving enforcement priority schemes in this area. In addition, to the extent that any marginal reliance interests do exist, the Department believes that the benefits of the prioritization scheme outweigh those interests.[52]

In short, while any set of priorities may result in some indirect fiscal effects on state and local governments (both positive and negative), such effects are extremely difficult to quantify fully, are highly localized, and would vary based on a range of factors, including policy choices made by such governments and outside our control. Moreover, they would be a necessary consequence of the Department carrying out its congressionally mandated duties in service to the national interest. The Department further believes that previous prioritization schemes have not engendered any reasonable or substantial reliance interests. Therefore, the Department has

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[50] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, available at https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

[51] E-mail from Nora Preciado, Director, Immigrant Affairs, to Kamal Essaheb, Counselor to the Secretary, DHS (Sept. 23, 2021, 05:42) (on file with author).

[52] The Department is aware that several states purported to enter into "agreements" with the Department at the end of the previous Administration. As the Department has explained in litigation, those documents were void ab initio and unenforceable. Any reliance on those documents is therefore unreasonable. To the extent those documents were ever valid, the Department has since terminated them.

determined that, even in light of the potential for such indirect fiscal effects or the theoretical possibility of reliance interests, the enforcement priorities articulated by the Department are an appropriate exercise of the Department's discretion.

Resource Considerations

Resource considerations have long justified the necessary application of enforcement policies and priorities. Nevertheless, the *Texas* district court in its injunction expressed skepticism over the Department's reference to resource limitations in the Johnson Memorandum, noting that the Government produced no evidence that "the resources it previously used for enforcement of the deprioritized categories are now being allocated to boost enforcement of the prioritized categories." *Texas*, 2021 WL 3683913 at *17. Rather, the Court cited anecdotal evidence presented by the States that, according to the Court, suggested that the Johnson Memorandum only resulted in a drop in enforcement actions against certain categories of noncitizens, but not a corresponding increase in enforcement actions against other categories of noncitizens.

Based upon data collected between the issuance of the Johnson Memorandum on February 18 and August 31, 2021, the interim priorities focus on public safety, national security and border security proved to be effective in channeling ICE officers' and agents' efforts toward cases these priorities. For instance, as the Johnson Memorandum defined the "public safety" category to include, in part, noncitizens convicted of aggravated felony offenses, ICE during this period arrested 6,046 individuals with such convictions compared to just 3,575 in the same period in 2020. Similarly, consistent with the Johnson Memorandum's border security prioritization of any noncitizen who entered the United States "on or after November 1, 2020" or who "was not physically present" in the United States before that date, ICE allocated enforcement resources to the southwest border to assist CBP in transporting, processing, transferring, and removing recently-arrived migrants, particularly through June, July, and August of 2021. These facts show that the guidance to the field matters; resource allocation shifted to focus on what the guidance required.

More generally, the Texas district court questioned whether the enforcement prioritization scheme would actually increase costs by delaying deportations of individuals who may not be deemed a priority, thereby increasing their incentives to file frivolous and time-consuming appeals and to ultimately abscond. This criticism is based on the misconception that if the Department did not prioritize its enforcement efforts—or if it prioritized enforcement in some different way—a significantly greater number of people could be arrested, detained, moved through removal proceedings, and processed for removal. But that is false. Resource limitations make that an impossibility, as has been the case since the Department was formed (and before that as well). Moreover, such an approach ignores the reality that the Department's overall safety and security mission is not best served by simply pursuing the greatest overall number of enforcement actions but is rather best advanced by directing resources to prioritize enforcement against those noncitizens who most threaten the safety and security of the Nation.

Relationship Between Enforcement Priorities and Statutory Mandates

Implicit in the notion of prosecutorial discretion is the idea that discretion only may be exercised within the bounds of the law. As discussed above, courts have long recognized that immigration officials possess broad discretion over immigration enforcement, including "whether to pursue removal at all." *Arizona*, 567 U.S. at 396. These concerns are "greatly magnified in the deportation context." *Crane v. Johnson*, 783 F.3d 244, 247 n.6 (5th Cir. 2015) (quotation omitted). Indeed, the Supreme Court has never required law enforcement officers to bring charges against an individual or group of individuals. *See Texas v. United States*, --- F.4th ---, 2021 WL 4188102, *4 (5th Cir. Sept. 15, 2021). In recent challenges to the Department's interim immigration enforcement and removal priorities, litigants have argued that various detention provisions within the INA constrain the Department's discretionary authority and even create affirmative duties to arrest, detain, and seek to remove broad categories of noncitizens. But the fact that many INA provisions state that the Executive Branch "shall" take certain actions does not eliminate the Department's discretion. To the contrary, longstanding Supreme Court precedent "hold[s] that the use of 'shall' . . . does not limit prosecutorial discretion." *See Texas*, 2021 WL 4188102, at *5 (listing cases). Indeed, the Fifth Circuit Court of Appeals recently rejected such an argument, explaining that although the two detention states at issue in the case before it—8 U.S.C. §§ 1226(c) and 1231—contained the word "shall," it ultimately concluded that 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 *6.

The Executive Branch has also long recognized this discretion. For example, the 2000 Meissner Memorandum explicitly contrasted the "specific limitation on releasing certain criminal aliens in" 8 U.S.C. § 1226(c)(2) with the general direction "that the INS 'shall' remove removable aliens" to illustrate how Congress can effectively limit agency discretion by statute.[53] But recognizing that even the limitation on release authority contained in § 1226(c)(2) did not override the agency's general prosecutorial discretion to decide whether to pursue removal of an individual or to abandon the endeavor entirely, that memorandum reaffirmed the authority of immigration officers—even with respect to noncitizens who would be subject to mandatory detention under a provision like § 1226(c)(2)—to cancel a Notice to Appear prior to filing with the immigration court or move for dismissal in immigration court.[54] That same principle would apply to the decision to cancel a detainer and choose not to pursue removal of such an individual in the first place. The Jeh Johnson Memorandum similarly recognized that although mandatory detention provisions may limit the authority of immigration officers to release individuals who would generally not be priorities for detention (e.g., noncitizens "who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest"), field office directors could consult with local ICE attorneys for guidance when confronted with such cases.[55]

Having said that, the Department does recognize that certain provisions within the INA place constraints on its authority to release noncitizens from ICE custody while the Department is pursuing their removal or during the statutory removal period. For instance, once ICE arrests a

[53] Meissner Memorandum at 3.
[54] *Id.* at 6.
[55] Jeh Johnson Memorandum at 5.

noncitizen who is subject to the custody provisions of 8 U.S.C. § 1226(c)(1), that noncitizen generally must remain in custody during the pendency of removal proceedings unless otherwise eligible for release pursuant to § 1226(c)(2), or as required to comply with a court order. Likewise, all noncitizens in ICE custody who are subject to the mandatory custody provisions of 8 U.S.C.§ 1231(a)(2)—those who 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)—must remain detained for the duration of the removal period unless release is required to comply with a court order. The Department's updated *Guidelines for the Enforcement of Civil Immigration Law* are fully consistent with these constraints and do not purport to override them.

Consideration of Alternative Approaches

The Department's focus on national security, public safety, and border security remains unchanged. The numerous stakeholder engagements, internal discussions, and reviews of policies, protocols, and priorities make clear that these are and should remain the overriding Departmental priorities.

The new guidelines however will mark a significant shift in how those priorities are operationalized. Specifically, they—reflecting lessons learned from numerous engagements and internal reviews—reject a categorical approach to the definition of public safety threat. They will reject as both under- and over-inclusive the interim guidelines' focus on whether an individual was convicted of an "aggravated offense" under immigration law, or an offense for which an element was active participation in a criminal street gang. In its place, the new guidelines will require the workforce to engage in an assessment of each individual case and make a case-by-case assessment as to whether the individual poses a public safety threat, guided by a consideration of aggravating and mitigating factors.

More specifically, the guidelines will provide general direction that a noncitizen found to pose a current threat to public safety—typically because of serious criminal conduct—is a priority for apprehension and removal. But the specific determination as to who presents a public safety threat is delegated to the field, which is instructed and empowered to make individualized decisions based on a case-by-case analysis and taking into consideration aggravating factors—such as the gravity of the offense of conviction and the sentence imposed, the nature and degree of harm of the offense, the sophistication of the criminal offense, the use or threatened use of a firearm or dangerous weapon, and a serious prior criminal record, and mitigating factors—including advance or tender age, lengthy presence in the United States, impact of removal on family in the United States, and other relevant considerations. Bottom line: these factors should be used to ensure that officer and agents are focusing on actual threats, rather than making on pre-conceived determinations of the nature or a threat. Meanwhile, the grandmothers, clergy, teachers, and farmworkers who have lived and worked in the United Sates, contributing to the country without causing harm, should not be a priority based solely on the fact that they are removable.

The Department also recognizes that implementation will require significant training, guidance, and effective review of decisions. But it reflects a determination that officers and agents need the

discretion to make case-by-case determinations to identify who poses a threat. Any catch-all definition or bright-line rule runs the risk of being both over- and under-inclusive.

The guidelines also will differ from the interim priorities by dispensing with the pre-approval process in the exercise of this discretion. This decision was based largely on feedback from members of the workforce, who sought additional flexibility in the exercise of their judgment. The guidelines will be coupled with extensive and continuous training program on the new guidelines, the creation of short- and long-term processes to review enforcement decisions to achieve quality and consistency, and comprehensive data collection and analysis. Each of these will be critical to ensuring that discretion is being exercised consistent with the guidelines and in furtherance of the Department's highest priorities. Importantly, implementation won't begin until 60 days after issuance to ensure that there is time to do this training—and do it well. The first 90 days will also be subject to particularly rigorous review, to allow for adjustments as needed, so as to ensure that discretion is exercised as intended—to focus on those who pose a threat to national security, public safety, and border security.

But at its core, the priorities reflect a determination that officers and agents need the discretion to make case-by-case determinations to identify who poses a threat. Conversely, they are guided by a determination that the many noncitizens that have been contributing members of our communities for years—including teachers, clergy, farmworkers, and nannies—generally should not be an enforcement priority.

In adopting this approach, the Department also considered several alternatives, including a so-called "checklist" approach, in which officers' and agents' discretion would have been more tightly controlled by strict lists of what types of actions to pursue. The so-called checklist approach has the advantage of predictability; it relies least on officers' and agents' discretionary decision-making, and it most strictly predetermines which noncitizens will be subject to an enforcement action. However, this approach has the disadvantage of foreclosing a nuanced, individualized assessment of each noncitizen's aggravating and mitigating attributes, and therefore risks overinclusive and underinclusive decisionmaking, which yield unjust or unwise outcomes.

Another alternative approach that was considered was the delineation of certain categories for which no discretion should be exercised (i.e., where enforcement actions are mandated). The legal claims hinge in part on the theory that Congress commanded that certain individuals be arrested, detained, and removed. For the reasons discussed above, it is the Department's position that its enforcement discretion is not circumscribed by the enactment of these provisions. That said, the Department could adopt such a requirement as a matter of policy. But the Department has concluded that doing so would be counterproductive. It would undermine the Department's ability to effectively prioritize its limited resources to focus on the particular noncitizens who pose the greatest threat to safety and security. For instance, were the Department to choose to pursue removal of all individuals encountered who would, upon being taken into custody, be subject to mandatory detention under § 1226(c), the Department's detention capacity would quickly be exhausted. The same is true with respect to those whose detention would be mandatory during the removal period and those subject to various detention authorities in 8 U.S.C. § 1225. Without a set of priorities to guide the exercise of enforcement discretion, where

legally permissible, the Department would have little to no control over how its resources were being spent and would be unable to achieve its highest national security, public safety, and border security priorities.

After much consideration and deliberation, the Department has chosen a path that couples priorities with discretion, training and oversight. This approach is founded in a steadfast focus on national security, public safety and border security, coupled with a steadfast commitment to the interest of justice and individualized assessment of threat.

Exhibit H

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

STATE OF TEXAS, STATE OF LOUISIANA

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

No. 6:21-cv-00016

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1.	*Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021)	AR_DHSP_00000001
2.	Sam Bernsen, *INS General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976)	AR_DHSP_00000022
3.	Memorandum from Doris Meissner, Comm'r, INS, *Exercising Prosecutorial Discretion* (Nov. 17, 2000)	AR_DHSP_00000030
4.	Memorandum from John Morton, ICE Dir., *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Jun 30, 2010)	AR_DHSP_00000043
5.	Memorandum from John Morton, ICE Dir., *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011)	AR_DHSP_00000047
6.	Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014)	AR_DHSP_00000053
7.	Memorandum from John Kelly, Sec'y of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017)	AR_DHSP_00000059
8.	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	AR_DHSP_00000065
9.	Memorandum from Tae Johnson, Acting Dir. of U.S. Immigr. and Customs Enf't, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021)	AR_DHSP_00000070
10.	Memorandum from John Trasviña, ICE Principal Legal Advisor, *Interim Guidance to OPLA Attorneys Regarding Civil*	AR_DHSP_00000077

	Immigration Enforcement and Removal Policies and Priorities (May 27, 2021)	
11.	Memorandum regarding Stakeholder Outreach in Furtherance of Department Civil Immigration Enforcement Guidance (Sept. 17, 2021)	AR_DHSP_00000090
12.	Memorandum from Cammilla Wamsley, Principal Policy Advisor, *Listening Sessions for Final Priorities*	AR_DHSP_00000095
13.	Memorandum regarding DHS Enforcement Priorities Stakeholder Outreach April 6–9, 2021	AR_DHSP_00000097
14.	Memorandum regarding DHS Enforcement Priorities Stakeholder Outreach April 14–May 20, 2021	AR_DHSP_00000102
15.	Memorandum regarding Conclusions Drawn from "AART" Data (Sept. 24, 2021)	AR_DHSP_00000108
16.	U.S. Immigration and Customs Enforcement Data Reports	AR_DHSP_00000112
24.	Memorandum regarding Conclusions Drawn From Implementation of the OPLA PD memo	AR_DHSP_00002240
25.	Memorandum from Tae Johnson, Acting Dir. of U.S. Immigr. and Customs Enf't, *Review of Policies, Procedures, and Resources Available to Victims of Crime* (July 30, 2021)	AR_DHSP_00002241
26.	Letter from James Comer, U.S. Rep., and Jim Jordan, U.S. Rep., to Tae Johnson, Acting Dir. of U.S. Immigr. and Customs Enf't (Feb. 17, 2021)	AR_DHSP_00002243
27.	Letter from Alix Desulme, Chairman, Haitian-American Elected Officials Network, to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Feb. 23, 2021)	AR_DHSP_00002247
28.	Letter from Southern Poverty Law Center, et al., to Michael W. Meade, District Dir., U.S. Immigr. and Customs Enf't (Feb. 4, 2021)	AR_DHSP_00002248
29.	Letter from Southern Poverty Law Center, et al., to Thomas Files, District Dir., U.S. Immigr. and Customs Enf't (Feb. 4, 2021)	AR_DHSP_00002252
30.	Letter from Dan Bishop, U.S. Rep., et al., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Mar. 11, 2021)	AR_DHSP_00002256
32.	Letter from Kwame Raoul, Att'y Gen. of State of Ill., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (May 28, 2021)	AR_DHSP_00002258
33.	Letter from Andy Biggs, U.S. Rep., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (July 6, 2021)	AR_DHSP_00002261
34.	Letter from Ben Johnson, Dir., Am. Immigr. Lawyers Ass'n, et al. to Alejandro Mayorkas, Sec'y of Homeland Sec. (July 31, 2021)	AR_DHSP_00002264
35.	Letter from Ron DeSantis, Gov. of Fla., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Aug. 26, 2021)	AR_DHSP_00002270
36.	Letter from Pat Fallon, U.S. Rep., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Apr. 26, 2021)	AR_DHSP_00002275
37.	Letter from Mike Thompson, U.S. Rep., to Alejandro N. Mayorkas, Sec'y of Homeland Sec., et al. (Mar. 3, 2021)	AR_DHSP_00002277

38.	Letter from Rick Scott, U.S. Senator, Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Feb. 19, 2021)	AR_DHSP_00002279
39.	Letter from Kevin J. Rambosk, Sheriff, Collier County, Fla. to Alejandro N. Mayorkas, Sec'y of Homeland Sec., et al. (Feb. 3, 2021)	AR_DHSP_00002281
40.	Letter from ACLU of Neb., et al., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Mar. 16, 2021)	AR_DHSP_00002285
41.	Letter from Alexandria Ocasio-Cortez, U.S. Rep., et al. to Alejandro N. Mayorkas, Sec'y of Homeland Sec., et al. (May 14, 2021)	AR_DHSP_00002290
42.	Memorandum from Peter Markowitz, *History and Analysis of Post-1996 Immigration Enforcement Agency Guidance* (June 4, 2021)	AR_DHSP_00002294
43.	Memorandum from ACLU regarding Suggested Changes to Priorities	AR_DHSP_00002304
44.	Letter from ACLU of N. Cal., et al., to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (June 28, 2021)	AR_DHSP_00002306
45.	Memorandum from Asian Pacific Institute on Gender-Based Violence, et al., regarding Evaluating Public Safety in the Context of Immigration Enforcement and Domestic Violence and Sexual Assault	AR_DHSP_00002317
46.	Letter from Cory A. Booker, U.S. Senator, et al., to Alejandro N. Mayorkas, Sec'y of Homeland Sec., et al. (April 15, 2021)	AR_DHSP_00002321
47.	Email from Nora A. Preciado, Dir. Imm. Affairs, Cities for Action, to Kamal Essaheb, Coun. to Sec'y of Homeland Sec., et al. (Sept. 23, 2021)	AR_DHSP_00002324
48.	Memorandum from We Are Home Campaign Recommendations, *Recommendations for the use of Prosecutorial Discretion* (June 16, 2021)	AR_DHSP_00002330
49.	Letter from Shoba Sivaprasad Wadhia, et al., to Alejandro N. Mayorkas, Sec'y of Homeland Sec., et al. (Aug. 24, 2021)	AR_DHSP_00002345
50.	Email from Leslye E. Orloff, Dir., Nat'l Imm. Women's Advoc. Project, to Royce Murray, Coun. to Sec'y of Homeland Sec., et al. (May 20, 2021)	AR_DHSP_00002354
51.	Letter from Imm. Alliance for Justice and Equity, et al. to Joseph R. Biden, President (Mar. 10, 2021)	AR_DHSP_00002434
52.	Letter from Tiffany Anderson, Co-Chair, Kan. Governor's Comm'n on Racial Equity and Justice, and Shannon Portillo, Co-Chair, Kan. Governor's Comm'n on Racial Equity and Justice, to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Mar. 29, 2021)	AR_DHSP_00002437
53.	Letter from Jim Mulhern, President, Nat'l Milk Producers Fed'n, to Alejandro N. Mayorkas, Sec'y of Homeland Sec. (Aug. 25, 2021)	AR_DHSP_00002439
54.	Letter from Am. Immigr. Lawyers Ass'n, et al., to John Trasviña, Principal Legal Advisor, U.S. Immigr. and Customs Enf't (July 19, 2021)	AR_DHSP_00002441

55.	Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799 (January 30, 2017)	AR_DHSP_00002450
56.	Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009 (Jan. 25, 2021)	AR_DHSP_00002455
57.	Executive Order 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021)	AR_DHSP_00002460
58.	Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011)	AR_DHSP_00002462
59.	Executive Office for Immigration Review Adjudication Statistics, Pending Cases, New Cases, and Total Completions, available at www.justice.gov/eoir/workload-and-adjudication-statistics.	AR_DHSP_00002467
61.	Graham C. Ousey & Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, Ann. Rev. of Criminology, 63–84 (2018)	AR_DHSP_00002468
62.	Am. Immigr. Council, *Resources: Immigrants' impact on public safety and states*	AR_DHSP_00002469
63.	Alana Rosenberg, et al., *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47(1) J. Drug Issues 132 (2017)	AR_DHSP_00002470
64.	Michael T. Light, et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, Proceedings of the Nat'l Acad. of Sciences of the USA (Dec. 12, 2020)	AR_DHSP_00002478
65.	John R. Lott, Jr., *Undocumented immigrants, U.S. Citizens, and Convicted Criminals in Arizona* (Feb. 18, 2018)	AR_DHSP_00002494
66.	Nat'l Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration* (2017).	AR_DHSP_00002502
67.	U.S. Sentencing Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* (Mar. 2016)	AR_DHSP_00002557
68.	Elizabeth Hinton, et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (May 2018)	AR_DHSP_00002558
69.	Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18–19 (1940)	AR_DHSP_00002619
70.	*Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53736 (Sept. 28, 2021)	AR_DHSP_00002639
71.	Jacob Stowell and Stephanie DiPietro, *Ethnicity, Crime, and Immigration in the United States Crimes By and Against Immigrants*, The Oxford Handbook of Ethnicity, Crime, and Immigration, 2014.	AR_DHSP_00002642
72.	Migration Policy Institute, *Profile of the Unauthorized Population: United States*, available at	AR_DHSP_00002723

	https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.	
73.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Amended Complaint (Mar. 8, 2021) (ECF Nos. 12–12-1)	AR_DHSP_00002730
74.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Pls.' Mot. for Preliminary Inj. (Mar. 12, 2021) (ECF Nos. 13, 13-1, 17)	AR_DHSP_00002863
75.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Defs.' Opp'n to Pls.' Mot. for Preliminary Inj. (Mar. 26, 2021) (ECF No. 26)	AR_DHSP_00002951
76.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Pls.' Reply (Apr. 2, 2021) (ECF No. 38)	AR_DHSP_00002985
77.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Defs.' Mot. to Dismiss (May 6, 2021) (ECF Nos. 59–59-1)	AR_DHSP_00003024
78.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Pls.' Suppl. Brief (May 7, 2021) (ECF No. 64–64-5)	AR_DHSP_00003069
79.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Defs.' Suppl. Brief (May 13, 2021) (ECF No. 69–69-1)	AR_DHSP_00003704
80.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Pls.' Resp. to Defs.' Mot. to Dismiss (May 13, 2021) (ECF No. 70–70-1)	AR_DHSP_00003745
81.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Pls.' Suppl. (May 19, 2021) (ECF No. 79–79-1)	AR_DHSP_00003782
82.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Defs.' Suppl. (May 21, 2021) (ECF No. 80–80-2)	AR_DHSP_00003817
83.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Order Granting Defs.; Mot. to Dismiss and Denying Pls.' Mot. for Preliminary Inj. (June 30, 2021) (ECF No. 91)	AR_DHSP_00003869
84.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Pls.' Mot. for Reconsideration (July 2, 2021) (ECF No. 96)	AR_DHSP_00003890
85.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Defs.' Resp. in Opp'n (July 16, 2021) (ECF No. 107)	AR_DHSP_00003896
86.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Pls.' Reply (July 23, 2021) (ECF No. 108)	AR_DHSP_00003904
87.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 2:21-cv-00186 (D. Ariz.), Order Denying Pls.' Mot. for Reconsideration (Aug. 12, 2021) (ECF No. 113).	AR_DHSP_00003912

88.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellants' Mot. for Inj. Pending Appeal (July 15, 2021) (Dkt. No. 10)	AR_DHSP_00003917
89.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellees' Resp. to Pls.' Mot. (July 23, 2021) (Dkt. No. 13)	AR_DHSP_00003952
90.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Order on Jurisdiction (July 27, 2021) (Dkt. No. 18)	AR_DHSP_00003978
91.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellants' Resp. to Court Order (July 27, 2021) (Dkt. 19)	AR_DHSP_00003980
92.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellees' Resp. to Court Order (July 29, 2021) (Dkt. 21)	AR_DHSP_00003982
93.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Order Denying Appellants' Mot. for Inj. Pending Appeal (July 30, 2021) (Dkt. 22)	AR_DHSP_00003984
94.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellants' Mot. for Reconsideration (Aug. 13, 2021) (Dkt. 23)	AR_DHSP_00003985
95.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Order Denying Appellants' Mot. for Reconsideration (Aug. 19, 2021) (Dkt. 24)	AR_DHSP_00004000
96.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellees' Resp. (Aug. 25, 2021) (Dkt 27)	AR_DHSP_00004001
97.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellants' Reply (Sept. 1, 2021) (Dkt. 31)	AR_DHSP_00004035
98.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Appellants' Brief (Sept. 1, 2021) (Dkt. 32)	AR_DHSP_00004050
99.	*Arizona, et al. v. U.S. Dep't of Homeland Security, et al.*, No. 21-16118 (9th Cir.), Order Denying Renewed Mot. (Sept. 3, 2021) (Dkt. 36)	AR_DHSP_00004180
100.	*Sheriff Brad Coe, et al. v. Joseph R. Biden Jr., et al.*, No. 3:21-cv-168 (S.D. Tex.) Complaint (July 1, 2021) (ECF No. 1)	AR_DHSP_00004182
101.	*Sheriff Brad Coe, et al. v. Joseph R. Biden Jr., et al.*, No. 3:21-cv-168 (S.D. Tex.) Pls.' Mot. for Preliminary Inj. (July 8, 2021) (ECF No. 7–7-2)	AR_DHSP_00004215
102.	*Sheriff Brad Coe, et al. v. Joseph R. Biden Jr., et al.*, No. 3:21-cv-168 (S.D. Tex.) Am. Complaint (July 15, 2021) (ECF No. 17)	AR_DHSP_00004263
103.	*Sheriff Brad Coe, et al. v. Joseph R. Biden Jr., et al.*, No. 3:21-cv-168 (S.D. Tex.) Defs.' Opp'n to Pls.' Mot. for Preliminary Inj. (Aug. 12, 2021) (ECF No. 33–33-3)	AR_DHSP_00004298
104.	*Sheriff Brad Coe, et al. v. Joseph R. Biden Jr., et al.*, No. 3:21-cv-168 (S.D. Tex.) Pls.' Reply (Aug. 23, 2021) (ECF No. 40–40-2)	AR_DHSP_00004398
105.	*Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fl.), Complaint (Mar. 8, 2021) (ECF No. 1, 1-3–1-8)	AR_DHSP_00004462

106.	*Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fl.), Pl.'s Mot. for Preliminary Inj. (Mar. 9, 2021) (ECF No. 4–4-18)	AR_DHSP_00004548
107.	*Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fl.), Defs.' Opp'n to Pl.'s Mot. for Preliminary Inj. (Mar. 23, 2021) (ECF No. 23–23-4)	AR_DHSP_00004976
108.	*Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fl.), Pl.'s Notice of Supplemental Exhibits (Apr. 5, 2021) (ECF No. 29–29-2)	AR_DHSP_00005040
109.	*Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fl.), Pl.'s Mot. to Amend (Apr. 29, 2021) (ECF No. 34–34-2)	AR_DHSP_00005065
110.	*Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fl.), Defs.' Resp. to Pl.'s Mot. to Amend (May 10, 2021) (ECF No. 36–36-1)	AR_DHSP_00005154
111.	*Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fl.), Order Denying Pl.'s Mot. for Preliminary Inj. (May 18, 2021) (ECF No. 38)	AR_DHSP_00005164
112.	*Florida, v. United States, et al.*, No. 21-11715 (11th Cir.), Appellant's Brief (June 14, 2021)	AR_DHSP_00005187
113.	*Florida, v. United States, et al.*, No. 21-11715 (11th Cir.), Appellees' Brief (July 12, 2021)	AR_DHSP_00005246
114.	*Florida, v. United States, et al.*, No. 21-11715 (11th Cir.), Appellant's Reply (Aug. 2, 2021)	AR_DHSP_00005316
115.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Complaint (Apr. 6, 2021) (ECF No. 1)	AR_DHSP_00005353
116.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Pls.' Mot. for Preliminary Inj. (April 27, 2021) (ECF Nos. 18–19-23)	AR_DHSP_00005383
117.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Defs.' Opp'n to Pls.' Mot. for Preliminary Inj. (May 18, 2021) (ECF No. 42–42-7)	AR_DHSP_00005685
118.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Declaration of Jason Clark (May 18, 2021) (ECF No. 46)	AR_DHSP_00005811
119.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Pls.' Reply (May 25, 2021) (ECF No. 51)	AR_DHSP_00005822
120.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Order Granting Pls.' Mot. for Preliminary Inj. (Aug. 18, 2021) (ECF No. 79)	AR_DHSP_00005859
121.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Defs.' Mot. for Stay (Aug. 20, 2021) (ECF No. 82–82-1)	AR_DHSP_00006019
122.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Pls.' Opp'n to Defs.' Mot. for Stay (Aug. 22, 2021) (ECF No. 85–85-2)	AR_DHSP_00006041
123.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Defs.' Reply (Aug. 22, 2021) (ECF No. 86)	AR_DHSP_00006065
124.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Declaration of Monica Burke (Aug. 23, 2021) (ECF No. 87–87-1)	AR_DHSP_00006071

125.	*Texas, et al. v. United States, et al.*, No. 6:21-cv-16 (S.D. Tex.), Order Granting-in-part Defs.' Mot. for Stay (Aug. 23, 2021) (ECF No. 90)	AR_DHSP_00006078
126.	*Texas, et al. v. United States, et al.*, No. 21-40618 (5th Cir.) Appellants' Mot. for Stay (Aug. 23, 2021)	AR_DHSP_00006082
127.	*Texas, et al. v. United States, et al.*, No. 21-40618 (5th Cir.) Appellees' Opp'n to Mot. for Stay (Aug. 30, 2021)	AR_DHSP_00006310
128.	*Texas, et al. v. United States, et al.*, No. 21-40618 (5th Cir.) Appellants' Reply (Sept. 1, 2021)	AR_DHSP_00006336
129.	*Texas, et al. v. United States, et al.*, No. 21-40618 (5th Cir.) Order Granting-in-part and Denying-in-part Mot. for Stay (Sept. 15, 2021)	AR_DHSP_00006351

Exhibit I

U.S. Immigration and Customs Enforcement

~~DRAFT – For Official Use Only – Pre-Decisional – Deliberative~~

September 17, 2021

MEMORANDUM FOR: Alejandro N. Mayorkas
Secretary
Department of Homeland Security

SUBJECT: Stakeholder Outreach in Furtherance of Department Civil Immigration Enforcement Guidance

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This memorandum summarizes a series of "listening sessions" with, and written recommendations from, internal and external stakeholders on the topic of department-wide civil immigration enforcement guidance.

We have conducted outreach with, among others:

- ICE Field Office Directors and Special Agents in Charge
- ICE ERO headquarters leadership
- Senior leadership of USCIS and CBP
- National Sheriffs' Association
- Southwest Border Sheriffs' Coalition
- National Association of Police Organizations
- International Association of Chiefs of Police
- Major Cities Chiefs Association
- U.S. Conference of Mayors
- National Association of Counties
- National Council of State Legislators
- National Association of Attorneys General
- National Hispanic Caucus of State Legislators
- National Governors Association
- Department of Justice
- Law Enforcement Immigration Task Force
- Alliance for Immigrant Survivors
- American Constitution Society
- National Immigrant Justice Center
- American Civil Liberties Union
- American Immigration Council
- International Refugee Assistance Project
- Public Defenders Association
- Mothers Against Drunk Driving
- Public Defender Coalition for Immigrant Justice
- Members of the National Qualified Representative Program
- Representatives of the AAPI community, including the Southeast Asia Resource Action Center and Asian-Americans Advancing Justice
- Advocates for victim/survivors of domestic violence
- Black immigrant leaders
- Law Enforcement Action Partnership
- Advocates for Victims of Illegal Alien Crime (AVIAC)

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Among many other groups, you have personally met with:

- ICE personnel in New York, Atlanta, Chicago, Los Angeles, New Orleans, San Antonio, and Philadelphia
- All ICE Field Office Directors, Special Agents in Charge, and Assistant Directors, on multiple occasions
- Members of the academic community
- Leaders from prominent Immigrant advocacy organizations, such as Make the Road NY, CASA, and the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA),
- Domestic violence advocates and specialists

The sessions have yielded wide-ranging discussion, but some common themes have emerged:

- The "aggravated felony" definition is difficult to apply and yields inconsistent results. Some say it is overinclusive; others say it is underinclusive.
- There is a general recognition that the current "border security" category must be revisited because it depends on a static date (Nov. 1, 2020).
- ICE Field Office Directors generally, but not universally, argue for the ability to arrest and remove a wider range of noncitizens.
- CBP personnel argue in favor of using categorized negative factors (i.e., "national security," "border security," and "public safety") to help organize their missions.
- CBP personnel express a desire for clear guidance on how to address cases on which ICE and CBP may differ in their interpretation of whether they fall within the guidance.
- CBP personnel express the need to define "border security" using parameters that are clearly identifiable—whether through time frames (e.g. "within two years"), or other metrics.
- USCIS personnel express a desire to retain flexibility to issue notices of appearance consistent with USCIS's mission to promote due process of noncitizens' immigration requests through immigration courts.
- Some USCIS employees argue in favor of specifying immigration fraud as a priority.
- Some ICE personnel appear to regard the "presumed priority" categories as restrictive mandates rather than presumptions that can be overcome. They argue for broader discretion to make arrests.
- Some ICE personnel see their role as nondiscretionary—to arrest any noncitizen, deferring questions of relief to lawyers and judges downstream.

- Mayors, police chiefs, and advocates describe what might be called "the 911 problem." In short, they express the concern that ICE's enforcement activities and reputation may deter victims and witnesses from contacting local emergency and public safety authorities. These groups suggest that ICE could ameliorate this effect by engaging in better public communication, by curtailing enforcement practices, or a combination.
- Sheriffs argue that ICE should expand enforcement, particularly along the border. One suggestion is that ICE implement a kind of arrest quota.
- There is a general recognition that the current guidance does not effectively prompt assessment of mitigating factors. Below is a list of mitigating factors. The factors in bold are the weightiest and most often cited.
    - **Lawful permanent residents**
    - **Long term residents**
    - **People who arrived in the U.S. as a minor**
    - **Primary caretakers and breadwinners**
    - **Availability of affirmative pathways for relief, such as pending applications for lawful status or relief from removal (including DACA)**
    - **"Stale" removal grounds, such as criminal conduct that occurred more than 10 years ago or when the individual was of young age**
    - **Vulnerable populations, particularly victims of violence or a history of trauma**
    - **Military service**
    - **The exercise of civil, labor, or other rights**
    - **Victims or witnesses to law enforcement, labor agency, or other government investigations**
    - **Pardons, clemency, and expungements**
    - Public service, other than military
    - Essential workers
    - Effect of action on future admissibility
    - Community engagement
    - Demonstrable rehabilitative measures
    - Bonds granted in pending criminal cases
- Advocates argue that the "presumed priority" categories have calcified into mandates. They suggest incorporating "presumed non-priority" categories or "safe harbors," or some other protection-oriented safeguards, for balance.
- Advocates argue that ICE officers misuse the guidance's catch-all language as a "priority four" or a "blank check" to implement broad, de facto priority categories that differ by field office. Advocates claim that, as part of this pattern, ICE officers categorize a person as a public safety risk based on any interaction with the criminal justice system, no matter how minor.

- Advocates express concern that the border security category is used to penalize those who seek asylum. The current definition also may not adequately account for earlier periods of stay, and strong ties to the U.S., for those who are reentering after November 1, 2020.
- Advocates note that the immigration system lags behind the criminal justice system in reforms related to controlled substance convictions.
- Advocates say that methods for identifying an individual's gang affiliation are marked by racial bias. Gang databases, they argue, are unreliable.
- Advocates are concerned about the risk of overbroad application of "national security" priorities.
- Advocates point to what they see as the low rate of reversal of negative decisions by ICE senior review officials (approximately 20%), the absence of any institutionalized mechanism to effectively escalate release requests, and lack of transparency in the decision making, as weaknesses.

There are also a series of "hard questions" that repeatedly arise, although there is no clear consensus on how to address them. These include:

- How can we avoid importing the biases of local policing into the civil immigration enforcement system? How do we ensure that our own enforcement actions do not lead to discriminatory outcomes?
- In domestic violence cases, how can we avoid chilling victims and witnesses from coming forward?
- In domestic violence cases, how can we account for convictions (and allegations) that arise from self-defense?
- How should we treat DUIs, particularly aged DUIs?
- How should we treat charges that are pending? How should we treat past arrests that did not result in a conviction? How should we weigh conduct described in a police report?
- What is the right level of deference to pending process in the immigration system, such as pending USCIS petitions, motions to reopen, and petitions for review?
- Should the exercise of 1st Amendment rights count as a "positive factor"?
- Should "community support" be a positive factor?
- Should there be retroactive relief for those affected by previous policies, i.e., dismissal of cases or return of previously removed individuals?
- Should there be additional accountability mechanisms for officers who do not follow the guidance?
- Should there be a "repeat low-level criminal" category?
- Should the fact of a prior removal make someone a priority?
- How should we treat prior convictions under 8 U.S.C. §§ 1325 and 1326(a)?
- How do we address the different approaches of DHS component agencies, with CBP examining through the lens of admissibility and ICE examining through the lens of deportability?

- How should we treat convictions stemming from conduct appurtenant to status (unlawful work, document fraud, driving without a licenses, etc.)?
- How does the "border security" priority intersect with the right to seek asylum and other forms of humanitarian relief at the border?

These sessions have also shed light on some "anterior" or "foundational" questions—that is, questions that must be answered before the drafting process begins:

- Should we use a "category" framework? Should we use a more laissez-faire framework of guiding principles with illustrative examples? Should we use something else—and if so, what?
- If use a more laissez-faire "principles" framework, how can we ensure the workforce applies those principles as attended? How do we assure the quality of supervisors' decisionmaking?
- Should the memo's scope include "special topics" like sensitive locations?
- Should the memo's scope include an appellate process, e.g., an "independent advisory panel" or "justice review board"?
- Should there be presumed *non*-priority categories or safe harbors?
- Is the current public safety definition overinclusive or underinclusive?
- If not "aggravated felony," then what?
- How should we redefine "border security"?
- How should we define and appropriately weight different mitigating factors and ensure they are considered?
- What metrics will we use to assess the success of the guidance's implementation?

Exhibit J

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Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: Tae D. Johnson
Acting Director

THROUGH: Matthew C. Allen
Senior Official Performing the Duties of the Deputy Director

FROM: Cammilla Wamsley
Principal Policy Advisor

SUBJECT: Listening Sessions for Final Priorities

Background

ICE held a series of listening sessions with the Field Office Directors (FODs) and Special Agents in Charge (SACs) to obtain feedback on the interim enforcement and removal guidance. The Acting Director requested the attendees provide candid feedback to improve upon the interim guidance. During the sessions, the participants identified areas of concern and methods to address those concerns.

Concern One:

Participants reported a general level of confusion with the aggravated felony priority due to the different interpretations from Circuit Court rulings of what constitutes an aggravated felony. The participants recommended the final guidance provide lists of appropriate crimes applicable nationwide. These lists should include the types of qualifying crimes involving force or violence, such as murder, armed burglary, rape, and sex offences. Participants opined that such lists provide a better structure and is better understood by employees who can apply lists more consistently in multiple locations.

Concern Two:

The interim guidance is silent regarding prosecutions. While ICE generally applies the interim guidance to cases presented for prosecutions to the U.S. Attorney's Office, there are many cases presented by Customs and Border Protection (CBP) wherein noncitizens are convicted of crimes involving illegal reentry who complete their sentence and are released from criminal custody. A significant portion of these individuals are outside of the priorities, which has caused some confusions with our federal partners. There was no consensus on the way forward, but two

themes emerged. The first is that ICE accepts and processes these individuals appropriately. The second is that the final guidance should apply equally to CBP and ICE and include prosecutions.

Concern Three:

Participants identified ongoing concerns with the conviction requirement in the interim guidance and pointed to charge bargains applied by state and local partners. Participants reported that obtaining the police reports related to the convictions often indicates a more serious set of circumstances occurred. Additionally, participants reported that ICE's past practice is to work with state and local partners to reduce the burden of criminal court using immigration removal processes. In essence, ICE uses Title 8 as a mechanism to address criminal conduct in the administrative realm.

This paradigm led to more cooperation in some locations, especially in towns and municipalities with smaller budgets. These locations work with ICE to address crimes that many state and local partners deem public safety risks, such as driving under the influence, domestic violence, and gang affiliation. Participants reported these locations are concerned about the fiscal impact. Further, locations on the Southwest Border typically return individuals on the same day ICE accepts custody.

Other locations in larger cities and municipalities reported the exact opposite result. These locations reported a general decline in local cooperation with ICE over the course of time. In many locations, state and local law enforcement agencies already do not provide ICE with information on arrests. The participants reported the focus on convictions may improve local relationships leading to robust partnerships with ICE. The focus on criminal convictions will likely combat the idea of ICE as a rogue agency and revamp ICE's public image.

Concern Four:

Participants raised concerns with cases that fall in the other priority for which the government has a vested interest in immigration proceedings. Participants identified cases with a national security nexus for which information cannot be introduced in the immigration realm, but other evidence exists and is used for removal. Other concerns related to noncitizens with multiple removals, passport or visa fraud, or long-term cases ordered removed. Finally, participants identified concerns with cooperating with foreign governments arrest warrants issued via an INTERPOL red notice. Participants wanted to highlight the continued cooperation with foreign governments could be negatively impacted if ICE ceases this practice. Participants opined that the final guidance should provide examples to assist in the identification of cases falling under other priority cases.

Exhibit K

U.S. Immigration and Customs Enforcement

DHS Enforcement Priorities
Stakeholder Outreach April 6-9, 2021

On April 6-9, ICE Acting Director Tae Johnson, CBP Acting Commissioner Troy Miller, and USCIS Acting Director Tracy Renaud held four stakeholder outreach "listening sessions," each with a combination of local government or law enforcement groups.

These listening sessions involved: on April 5, the National Sheriffs' Association and Southwest Border Sheriffs' Coalition; on April 6, the National Association of Police Organizations, the Major City Chiefs Association, and the International Association of Chiefs of Police; on April 7, the U.S. Conference of Mayors and the National Association of Counties; on April 8, the Law Enforcement Immigration Task Force.

At the beginning of these listening sessions, ICE Chief of Staff Timothy Perry proffered five open-ended prompts to spur discussion:

- In your communities, what is the most important public safety issue?
- How does civil immigration enforcement support the public safety mission of your constituents? What would you like ICE, CBP, and USCIS to do to better support that mission?
- Have you noticed anything about our current enforcement practices that you would want to see changed?
- How is the relationship between your constituents and DHS components, and how can that relationship be improved?
- If you were drafting the final guidelines, what would you include and what would you take out?

While offering these prompts, Mr. Perry emphasized that all comments or reactions were welcome, whether encompassed by the prompts or not. This memorandum consolidates the most salient points raised in all the discussions.

Public safety needs and priorities

Much of the discussion focused on what criminal history or other derogatory information should drive civil immigration enforcement actions. In addition to felony crimes of violence, the participating members identified domestic violence (DV), sex offenses, and child abuse cases as crimes that DHS should also prioritize. Many participating law enforcement officers requested that ICE prioritize the removal of those convicted of DV since the removal would better address

the risks to the victim. These participants agreed that DV is a difficult area to police and that it is likely there will be concerns from the social services side of the house, but that the locals will work with these social service industry members to provide services for the victim. The participants requested DHS help state and local law enforcement to get the victims out of the situation by removing perpetrators who are convicted (and for some locations, simply charged) with DV. While participants did acknowledge there could be a chilling effect, some believed the benefits outweighed the concerns.

Another crime with cross-cutting interest involved gang participation. Some participants pointed out that gangs are heavily involved in local crime and the crimes committed involve very violent circumstances. Those participants requested the DHS guidance focus on proper vetting of individuals to better identify gang ties. Conversely, other participants did not identify gang membership as a particular concern.

Crimes involving illicit substances and driving under the influence had less emphasis than crimes of violence but were a common theme. The participants identified concerns with the aggravated felony language in the current policy and the difficulty for state and local partners to understand those factors as well as explain it to local groups. The participants pointed out that in different locations, there is likely to be varying levels of interest in immigration related activities and that this does not readily lend to a one-size-fits-all viewpoint and that there should be some flexibility built out in order to address cases through the lens of totality of the circumstances.

Future Enforcement Priorities

The participants agreed that future enforcement priorities should identify the crimes considered a priority for immigration enforcement in a clear manner. Most preferred the development of a list of crimes, as opposed to the "aggravated felony" language, so that law enforcement and the public can better understand what crimes the focus of immigration enforcement are. This clarity would also contribute to the overall ICE mission since federal, state, and local partners would better be able to assist in messaging in simpler terms with their respective communities. In turn, many participants pointed out that this method should help people in the communities who either lack status or whose family member lacks status to engage with local law enforcement more readily. The participants pointed out that local police often build community relations through a multitude of arenas and discretion is key to local law enforcement.

The most common themes recommended for enforcement priorities included sexual assault crimes, crimes against children, gang and drug activities, violent crimes, and property crimes for repeat offenders. Further, the participants recommended aged convictions should be discretionary or ICE should place a hard cap along the lines of a statute of limitations. The participants recommended that ICE review the criminal records of individuals in their entirety to calibrate criminal backgrounds and recidivism when deciding appropriate enforcement decisions. The participants advised that a scalable approach may be warranted for different type of cases which may not rise to ICE priorities but are nevertheless a concern for public safety (e.g. misdemeanor domestic violence). The participants recommended the future priorities allow for discretion and that ICE view local law enforcement through the lens of increasing state and local partnership to address any chilling effects (which could extend to many crimes).

The participants pointed out that the delay in immigration outcomes from the immigration court system contributes to the situation wherein people without immigration status are residing in their communities. This delay, coupled with a lack of ICE engagement with state and local leaders and community leaders, disincentives these members of the community to come forward to report crimes either as a witness or a victim. Alternatively, some of the participants pointed out a desire to leverage immigration proceedings for use in criminal investigations.

There was a noted interest among law enforcement partners near the Southwest Border to be more involved in the development of the future priorities. These locations reported that they are more strongly impacted than other locations due to their proximity to the border. This group also requested ICE provide advance notification and approval on policies relating to removals, transfers, and placements.

Worksite Enforcement or Large-Scale Enforcement Actions

The participants requested that ICE consider how a "sweep" affects communities and the relationships. Participants requested that the enforcement priorities include a requirement for ICE to notify local officials about large-scale enforcement actions in communities. The participants reported a preference to plan for a holistic response to address the needs of the local community, including the appropriate preparation for social service officials. State and local partners need time to plan for appropriate social service interventions and follow-ups and coordinate investigative efforts. The participants pointed out that without these notification protocols, it is difficult if not impossible to overcome the concerns community members have with their law enforcement agencies partnering with ICE.

This vein of discussion highlighted that the current guidance may lack sufficient specificity for individuals with special vulnerabilities, such as parents of small children and human trafficking victims.

Border Security

Smaller community officials (which include law enforcement with large rural areas to police) request the border security priority be revisited to balance the ICE priorities with the viewpoint of their constituents who express fear of those noncitizens CBP releases from the border. These smaller communities point to resource concerns as another factor that ICE should consider for the updated enforcement priorities, such as the requirement to rescue noncitizens who are lost in rural areas along the border with very little access to water. Enforcement priorities should look closely at factors impacting communities and consider whether a re-strategy is necessary. State and local officials located at or near the Southwest Border also raised concerns with COVID-19 testing for individuals DHS released from custody on the border. These officials pointed out the more robust notifications to state and local officials could assist in managing their community members uncertainty and fears.

These state and local officials located at or near the Southwest Border advised that border security priority must address federal responsibilities and set out clear expectations for what state and local leaders should be responsible for. Those officials pointed out concerns from the local

community about the people who are being released and a lack of transparent communication about these releases. Further, these officials reported an uptick in criminal activity associated with the current priorities and reported concerns with the balance between local law enforcement and border security.

Conversely, participants in larger metropolitan areas located some distance from the border requested ICE reconsider the hard date of October 1, 2020. Participants raised concerns that if the updated priorities were in play for extended time, people who have settled in their communities who become entrenched in their communities will still meet the border security priority. This group opined that the priority concentrate on the resources necessary, review all aggravating and mitigating factors, or establish a rolling timeframe that better defines the border security as a near term priority (e.g. two weeks, 12 months) instead of an exact date.

Communication

The overwhelming outtake from the groups was that ICE needs to engage in a meaningful, robust manner with local communities to build trust. The groups pointed out that communication is key because there is a pervasive fear in some communities regarding ICE's enforcement actions in their locations. One location reported that community reports and questions regarding ICE enforcement required the opening of a hotline to address the rumors in the communities. State and local leaders opined that ICE should develop a strategy to inform community members about the ICE priorities to ensure proper understanding of the implementation. This communication should include methods to ensure that community members do not feel unduly targeted by immigration enforcement.

State and local leaders pointed out that partnering with ICE contributes to a chilling effect for victims and witnesses coming forward to report crimes. State and local partners pointed out that ICE needs to engage transparently to educate the public so that they are not afraid to call the local police because of a fear of deportation. State enforcement pointed out that the U visa process is pivotal in many cases and availability and training options should be strengthened. These groups also identified a training gap with their local staff and that ICE should improve communication with federal, state, and local officials to better understand the types of immigration benefits available to victims and witnesses of crimes. Therefore, ICE should develop communication strategies that address the perceived notions that the ICE enforcement priorities includes crime victims and witnesses. The participants advised that ICE should consider issuing public statements to the effect that ICE will not prioritize individuals with minor criminality, especially when those individuals are assisting state and local authorities.

Finally, state and local leaders pointed out that they are best situated to be ambassadors to the public regarding ICE priorities. Local LEOs are generally not well-equipped to answer their community members questions regarding immigration laws. Many partners reported an interest in ICE providing a unified message in an easily digestible format intended for line-officers to advise the public about the ICE priorities. As such, ICE should consider helping local officers understand immigration policy and the ICE procedures, where possible. ICE should provide training for state and local law enforcement on the updated guidance so our partner law enforcement agencies can better speak to the work of ICE, the ICE priorities for enforcement, and ICE's overall mission.

Participants
National Sheriffs' Association
Southwest Border Sheriffs' Coalition
National Association of Police Organizations
International Association of Chiefs of Police
Major Cities Chiefs Association
U.S. Conference of Mayors
National Association of Counties
Law Enforcement Immigration Task Force

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Representatives from:

Office of Mayor, Orange County, Florida
Office of the Mayor, Mesa, Arizona
Office of the Mayor, San Diego, California
Office of Mayor, Los Angeles, California
Office of the Mayor, Salt Lake City, Utah
Office of Commissioner, Providence, Rhode Island
Office of Commissioner, El Paso County, Texas
Office of Commissioner, Charlotte County, Florida
Office of Commissioner, Hennepin County, Minnesota
Office of Commissioner, Palm Beach County, Florida
Office of the City Manager, Mesa, Arizona
New Mexico Association of Counties, Santa Fe, New Mexico
Office of the New Americans, El Paso County, Texas
Los Angeles Police Department, Los Angeles, California
Mesa Police Department, Mesa, Arizona
Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Long Beach Police Department, Long Beach, California
Office of Community Services, El Paso County, Texas
Marshalltown Police Department, Marshalltown, Iowa
Polk County Sherriff's Department, Des Moines, Iowa

Exhibit L

U.S. Immigration and Customs Enforcement

DHS Enforcement Priorities
Stakeholder Outreach April 14-May 20, 2021

From April 8-29, ICE Chief of Staff Timothy Perry held five stakeholder outreach "listening sessions", with a combination of governmental and non-governmental organizations.

These listening sessions involved: on April 8, the American Constitution Society; on April 14, the Alliance for Immigration Survivors; on April 20, the Department of Justice; April 29, the National Association of Attorneys General, the National Council of State Legislators; the National Hispanic Caucus of State Legislators, the National Governors Association, the National Immigrant Justice Center, the American Civil Liberties Union, the American Immigration Counsel, and the International Refugee Assistance Center; and on May 20, the Black Alliance for Just Immigration, the Brooklyn Community Bail Fund, the Vera Institute for Justice, the Leadership Conference on Civil and Human Rights, and the Center for Constitutional Rights.

At the beginning of these listening sessions, ICE Chief of Staff Timothy Perry proffered open-ended prompts to spur discussion:

- In your communities, what is the most important public safety issue?
- Have you noticed anything about our current enforcement practices that you would want to see changed?
- If you were drafting the final guidelines, what would you include and what would you take out?

While offering these prompts, Mr. Perry emphasized that all comments or reactions were welcome, whether encompassed by the prompts or not. This memorandum consolidates the most salient points raised in all the discussions.

VULNERABLE POPULATIONS

Most participants pointed out that humanitarian cases are best managed by USCIS since that agency offers more consistency in decision-making. Most groups pointed to the removal of U and T visa applicants as particularly troubling and pointed out that ICE could establish criteria for individuals that exempt U and T visa applicants from enforcement. This stance would better protect survivors from further unnecessary trauma by the U.S. government. Instead, the U.S. government should transition to a protector of victims and safeguard their rights, apply the waivers for criminal activity by victims proactively, and maintain a victim-centered approach throughout the immigration process. Participants pointed out that when crime victims are able to access deferred action benefits early in the process, cooperation with law enforcement increases 114%. Thus, early deferred action grants lead to an increase in the ability of victims to access

justice through the American court systems, instead of over-reliance on removal of the perpetrator which does not equate to safety for the victim.

A common concern included the difficulty noncitizens face in obtaining an agreement for OPLA to terminate proceedings once USCIS issued a prime fascia determination for U and T visa applicants. Many groups opined that OPLA attorneys should also be required to attend training on survivor-based determinations. There was a consensus that OPLA attorneys need to create space to engage with the advocacy partners to better manage the litigation process for vulnerable people, including families, domestic violence survivors, and other crime survivors.

Some participants identified a growing concern with state and local convictions of the victims of domestic violence (DV). These participants pointed to a pattern in which state and local police agencies lacked appropriate language access for victims and an over-reliance on obtaining information from the perpetrators, thereby rendering the police reports non-probative in many instances. Moreover, some DV perpetrators are actively involved in attempts to get their victim remove, most especially those with language access issues. These groups pointed out that DHS should refrain from taking an immigration action until the finalization of any criminal case, and also pointed out that the recidivism rate for noncitizens removed before the criminal case is complete is actually higher than for those noncitizens who complete the criminal case and then are placed in immigration proceedings.

The groups pointed out the racial disparity in policing in the United States which leads to disproportionate convictions. Some of the participants pointed out use of "race" case law is prejudicial; ICE should align with the DOJ memo from 2014. There was a consensus that ICE should work with the Office of Civil Rights and Civil Liberties and nongovernmental organizations to address racial disparities in future and past practices and procedures. There were concerns raised as well in the context of state and local law enforcement agencies with inordinate prosecution rates for Black and brown people and how those actions could affect the immigration status of noncitizens. The participants pointed out that statistically throughout the life cycle of criminal cases, black and brown people are over-represented in the arrest, prosecution, and sentencing phases of the criminal process. Over-representation in the criminal justice system leads to more interactions with immigration authorities and an overrepresentation in the immigration policing.

Most participants pointed out that the disparate application of criminal law for black and brown people lead to a higher likelihood of immigration interaction with ICE via 287(g) agreements. Many participants also pointed out that when the criminal justice system and the immigration system collides (e.g., local authorities release a noncitizen to ICE before the outcome of the criminal case), there lies concerns with continued equal access to the criminal justice system. ICE normally requires a writ for someone to be turned over to local authorities for trials, which is time-consuming and difficult if the person is not represented. Additionally, ICE will sometimes remove a noncitizen even if the criminal case is still ongoing.

The groups pointed out that the racial disparity concerns are threaded through the historical records as it pertains to criminal prosecution under 8 U.S.C. 1325 and 1326. The groups pointed out that the framers of the 1924 National Origins Act intended to reduce the immigration of undesirable immigrants based on their own nativists and eugenics ideology in manner that

criminalized the irregular crossing of black and brown people. The law did not address the nonimmigrant overstays since those individuals were largely of Northern and Central European nationalities. The 1965 Hart-Cellar act repealed most of the national origins formula but did not address prosecution under 1325 or 1326.

Participants pointed out that 1325 and 1326 prosecutions represent a statistical anomaly with 96% of Latino descent. Fewer of these cases go to trial and have harsher sentencing than similar statutes. Some group members identified 1325 and 1326 cases since January 2021 did not appear to be consistent with priorities or the intent of the Administration's immigration goals, pointing to prosecutions of individuals with little to no criminal backgrounds for which ICE and CBP pursued prosecution. Some of the groups pointed out that there is an increase in the number of public defenders who are winning 1325 and 1326 cases at jury trials.

Because of the disparate application of 1325 and 1326 prosecutions to black and brown people, the groups recommended that DOJ and DHS conduct a review of the inherent bias identified in the law and refrain from using either section of law for prosecutions until that review is complete. If an overall prohibition on 1325 and 1326 is inappropriate, the group members requested DHS stop pursuing the prosecution for people who are claiming asylum; for people with underlying removal orders that are not a current priority; for people with a removal order that is improvidently issued; and for people with in absentia removal orders. The groups also recommended that DHS refrain from reinstituting Operation Streamline. The groups also requested DHS stop pursuing prosecution for noncitizens who provide false names who are seeking asylum under 8 U.S.C. 1001.

Many participants requested ICE identify methods to identify noncitizens with special vulnerabilities who may be eligible for reinstatement of removal orders. ICE should include a requirement to evaluate if the issuance of a Notice to Appear would be more appropriate, given the vulnerabilities the noncitizen presents with.

A shared area of concern was that ICE should identify mechanisms to captures a way to address cases in which harm occurred by the U.S. government, specifically referring to the zero-tolerance policy and the separation of families.

Many group members pointed to deferred enforced departure as an appropriate avenue for vulnerable populations from designated countries and regions that endure political or civic conflict or natural disasters to remain in the United States. The President can identify criteria in a directive format with additional requirements that individuals would need to fulfil, including demonstration of continuous presence in the United States.

PRIORITIES

Prosecutorial discretion should be better defined and is most effective when executed at the earliest moment possible. ICE must follow through on the guidance to refrain from automatically arresting everyone as the result of an arrest or who is in jail. This is especially important for victims of domestic violence since many policy agencies will arrest both the perpetrator and the victim. This creates a chilling effect for noncitizen domestic violence victims to seek assistance from law enforcement. All the participants pointed out that ICE needs to ensure space is given

for all people to seek assistance from state and local law enforcement without the fear of an immigration action.

Participants pointed out the public safety priority is overly inclusive. "Gang membership" may be too broad as it is flawed and racialized. Instead, ICE should focus on crimes with an element of violence and personal harm. Another common theme revolved around the element of aged crimes, even if a crime of violence or an aggravated felony. Some suggested following the five-year timeline as set by the crimes involving moral turpitude.

Of note in the racial disparity concerns is the concept that to reach true racial equity in immigration enforcement, ICE should enforce immigration law by focusing on the disparate experience of black immigrants in the U.S. criminal justice system. The participants identified ongoing harm in the black community based on 1990s laws rooted in racism, both in the criminal and immigration realms. The participants pointed out that over-policing of black communities results in higher arrest and prosecution rates, as well as longer sentences compared to white people who commit the same types of crimes. The interim priorities do not address this over-policing paradigm. In fact, the participants pointed out that the priorities contribute to continued harm within the black communities as an extension of the disparate treatment within the criminal justice system. The current priorities reinforce the racial injustice in criminal justice system which arrests, convicts, and penalizes black defendants at greater rates. This is especially concerning for those noncitizens who meet the definition of an aggravated felony based on the longer sentences imposed on black and brown people.
The groups identified concerns with making driving under the influence or controlled substance convictions a priority due to the over-policing of black and brown people. Also, the groups deemed these types of convictions as substance abuse and addiction issues that should be managed through treatment not punishment.

Most participants agreed, based on systemic racism identified above, that DHS must adhere to the Executive Order on Advancing Racial Equity issued on January 20, 2021. The participants pointed out the variety of studies and statistical analysis bears out that DHS must address the disparate treatment of black and brown immigrants by centering future policy on justice for those harmed by governmental tactics related to systemic racism. Participants stated that centering reforms on justice for black noncitizens will ensure the just application of immigration law for all noncitizens.

Some group members recommended that the border security priority was overly broad and should be better framed to address the concerns relating to *refoulement.* These members identified concerns from the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRRIRA), which expanded the aggravated felony definition and provided an avenue for the U.S. government to remove refugees to persecution (*refoulement)*, even if their crime did not fit the "particularly serious crime" definition as required under the UN Convention relating to the Status of Refugees, which the United States is bound by through its ratification of the UN Protocol relating to the Status of Refugees in 1967. The group members pointed out that IIRIRA made it impossible for any noncitizen convicted of an aggravated felony with a five-year sentence to obtain protection from return to persecution. This means the U.S. cannot adhere to international standards in which only refugees who have been convicted of a "particularly

serious crime" *and* who "constitute a danger to the community" of the United States can be returned to places where they would be persecuted.

The groups requested that ICE identify groups of people who should be categorically protected from immigration actions. The groups pointed out that this stance may better address the current paradigm in which ICE looks to criminality as the principal factor driving decisions.
The groups pointed out concerns with how ICE and CBP point to individuals who frequently enter the United States without inspection as an someone who is openly flouting U.S. law. They pointed out that understand that parents who have children in the United States and had to return to their home country have no recourse on legal ways to get back to their children. These people are desperate to reunite their family. The groups recommended DHS cease the use of Operation Streamline and referencing the consequence delivery system.

Many of the participants pointed to the memorandum entitled "Exercising Prosecutorial Discretion" issued in 2000 by former INS Commissioner Doris Meissner (Meissner Memo) as a document ICE should look to when drafting the updated enforcement priorities. The Meissner memo details the cost-related arguments behind prosecutorial discretion. The Meissner memo also included a mandatory review of all factors to maximize the likelihood the serious offenders would be identified, while also identifying a host of humanitarian factors for consideration. The Meissner memo also pointed out a noncitizen did not need to show every factor to qualify for prosecutorial discretion; rather, a review must be based on the totality of the circumstances and not any one factor considered in isolation. Most notably, the Meissner memo advised officers that they were expected to exercise discretion in a judicious manner at all stages of the enforcement process, including planning investigations and enforcing final orders of removal, with appropriate caveats for supervisory approval.

Many participants also pointed to the "particular care" language included in the memorandum entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" issued on June 17, 2011 by John Morton. The Morton Memo outlined the ICE's enforcement priorities; however, it further stated that when ICE staff encountered potentially deportable noncitizens, an ICE assessment will include a review of the length of time in the United States, presence in the country since a very young age, education, military service, social ties to the United States, and age. In addition, this memo emphasized that "particular care" be taken with cases involving veterans, long-time LPRs, children and elderly individuals, victims of domestic violence or trafficking, and people with serious health conditions.

Many participants pointed to the patchwork of decisions regarding auto-stays in U.S. circuit courts. Instead of relying on the court decisions. ICE should consider establishing policy to stay removals for those who file motions to reopen, motions to reconsider, or petitions for review, regardless of the circuit court's stance on auto-stays.

TRANSPARENCY

The groups recommended that ICE strengthen policy and training for 1367 protections. The groups recommended increasing transparency for the accountability of ICE staff who do not adhere to 1367 protections, the priorities, and law enforcement tactics. ICE should include

language to ensure transparency in policing by providing statistical data to the public. This data should include race, gender, and nationality.

Some of our partner agencies expressed concern with the issuance of the Tae Johnson memo without suitable notification. These partners identified unintended consequences related to ICE lifting detainers for non-priority individuals which affected the release plans for those individuals. This group requested ICE better coordinate with our law enforcement partners. Many identified a gap in communication from ICE on matters that affect their operations. ICE should engage in a robust public engagement campaign to ensure external stakeholders are informed about the changes at ICE.

Participants raised concerns with the immigration bond system. Their concerns revolved around the increase in bond amounts set by immigration judges and DHS, pointing out there seems to be no particular requirements in place. The groups pointed out that bond amounts are different from immigration judge to immigration judge for cases with very similar fact patterns. Further, there is no clear policy available to the public to better understand how bond amount decisions are made, highlighting that in some instances bonds are set at high amounts with little justification. These high bond amounts frequently mean that families are forced to seek assistance from immigration bond companies, who charge exorbitant rates and may require the released noncitizen to pay for ankle monitoring (at a cost of $400 a month) and agree to random home and office visits. Participants identified concerns with these immigration bond companies being largely unregulated. Finally, members pointed out that even when bonds are issued, the logistical hurdles to pay cash bonds are such that many families struggle to be able to report to the ICE office in the limited times the office accepts bonds because the ICE office may be far from their homes or the family is unable to take off work.

Participants

Alliance for Immigration Survivors
American Constitution Society
Department of Justice
National Council of State Legislators
National Association of Attorneys General
National Hispanic Caucus of State Legislators
National Governors Association
National Immigrant Justice Center
American Civil Liberties Union
American Immigration Counsel
International Refugee Assistance Center
Public Defenders Association
Mothers Against Drunk Driving
Public Defender Coalition for Immigrant Justice
UCLA Center for Immigration Law and Policy
Black Alliance for Just Immigration
Brooklyn Community Bail Fund
Vera Institute of Justice
National Immigration Project
Center for Constitutional Rights

Exhibit M

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

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	No. 6:21-cv-00016

DECLARATION OF THOMAS DECKER

I, Thomas Decker, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am currently serving as the Acting Assistant Director (AD) for Field Operations for the Enforcement and Removal Operations (ERO) component of U.S. Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security (DHS). In this capacity, I oversee, direct, and coordinate all ERO Field Operations activities throughout the nation's field offices and sub-offices in an effort to enhance national security and public safety while ensuring such activities further ERO goals and comply with policies and initiatives set forth by the DHS Secretary, ICE Director, and ICE Health Service Corps.

2. Since January 2017, I have held the position of Field Office Director for the ICE ERO in New York City Field Office. I have operational responsibility for the five Boroughs of New York City (Manhattan, Brooklyn, Bronx, Queens and Staten Island), Long Island (Nassau and Suffolk counties), and the upstate counties of Dutchess, Putnam, Sullivan, Orange, Rockland, Westchester and Ulster. In addition to the Field Office in New York, the office maintains personnel at the Varick Street Processing Facility, Newburgh, NY Sub-office, and Long Island, NY Sub-office.

3. I began my federal career in 1993 with the Immigration and Naturalization Service where I served as a District Adjudications Officer in New York. After transferring to the Newark, New Jersey office in 1994, I accepted a position as a Deportation Officer in April 1996 and was then promoted to Supervisory Deportation Officer in September 2001. I was selected as the Deputy Field Office Director in Philadelphia and served as the Acting Field Office Director for Philadelphia from November 2004 until March 2006 when I was appointed to the position permanently.

4. I have participated in several detail assignments—a temporary posting to another position within DHS—including that of Acting Assistant Director of Operations for HQ Detention and Removal Operations, Acting Deputy Field Office Director for the New York Field Office, in addition to the most recent details to ERO Chicago Field Office to serve as the interim Field Office Director in January 2021, then to Washington, D.C., as the Acting Deputy Assistant Director for Field Operations East.

5. This declaration is based on my personal knowledge and experience as a law enforcement officer and on information provided to me in my official capacity.

II. Harm to ICE from Grant of Preliminary Injunction

6. I am aware of this litigation in which Plaintiffs seek a preliminary injunction enjoining enforcement and implementation of the policies described in DHS's January 20 Memorandum in Section B entitled "Interim Civil Enforcement Guidelines" and ICE's February 18 Interim Guidance which implemented, among other things, the Section B priorities of national security border security, and public safety. I am also aware that Plaintiffs seek the Court to issue a mandatory injunction requiring DHS and ICE to take into custody, and refrain from releasing, any noncitizen who is covered by 8 U.S.C. § 1226(c)(1) or 8 U.S.C. § 1231(a)(2)).

Inability to Prioritize Use of Finite Resources

7. Implementing the terms of Plaintiffs' requested relief would be unreasonably and unduly burdensome, if not entirely impossible. Moreover, Plaintiffs' requested relief would adversely impact ICE—and the agency's critical public safety and national security mission—in a number of ways. First, there could be a substantial number of noncitizens who would fall within the categories identified by Plaintiffs and enforcement actions against this population would require significant ICE bedspace and personnel which does not currently exist. ERO is currently appropriated sufficient funding for 34,000 detention beds to support its mission to enforce immigration law. Due to this finite number of detention beds, ERO needs to prioritize its detention resources to support the detention of certain noncitizens, especially those who are convicted criminals, subject to mandatory detention under immigration law, and/or recent border entrants. Compliance with the proposed injunction would likely require expansion of these resources beyond those currently budgeted and

allocated by Congress; additional Congressional approval is not guaranteed and beyond ICE's control.

8. Second, compliance with such an order could adversely impact the ability of ICE to take immediate enforcement action against noncitizens who pose a security threat or other real harm to U.S. communities. There are commonly believed to be approximately 11 million noncitizens in the United States who do not have authorization to reside here. In addition, lawful permanent residents and other noncitizens who are authorized to be in the United States may be removable for a variety of reasons, including those connected to national security and public safety concerns. At present, ICE ERO officers follow the February 18 ICE Interim Guidance to determine whether a noncitizen is a civil immigration enforcement and removal priority for the Department and, if so, whether to place a detainer on someone who is currently in federal, state, or local custody or make an arrest. Officers determine first whether the noncitizen is removable, and if so, which charge(s) of removability apply. If an officer encounters a noncitizen in a state or local jail who has been convicted of a crime, determining whether that individual is subject to 8 U.S.C. § 1226(c)(1) or 8 U.S.C. § 1231(a)(2) requires legal analysis secondary to the determination that probable cause exists as to removability. In order to comply with Plaintiffs' requested relief, ICE would have to first determine the immigration and criminal history status, or lack thereof, of each noncitizen it encounters; second, ICE would have to determine whether these noncitizens subject to detention under either section 1226(c) or section 1231(a)(2); and then, ICE would have to execute the appropriate enforcement action. Each step would require a massive influx of investigative and operational resources.

9. Further, an attempt to initiate enforcement actions indiscriminately among this population, instead of against certain prioritized noncitizens, would not be an efficient or reasonable apportionment of ICE limited resources and would likely prevent ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety. Indeed, implementation of ICE's interim priority structure has enabled the agency to focus resources on ensuring the most dangerous noncitizens are not released back into the community.

10. Third, the requested relief would significantly curtail ICE's prosecutorial discretion. The Immigration and Naturalization Service (INS), one of the Department of Homeland Security's (DHS) predecessor agencies, has exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909 to maximize use of scarce agency resources, to protect the United States from national security threats and to protect our citizens and communities from harm. *See Department of Justice Circular Letter Number 107*, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also, e.g.,* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

11. The implementation of the enforcement priorities set forth in the DHS January 20 Memorandum and the ICE February 18 Interim Guidance has assisted ERO in re-tasking personnel to support operations in the Southwest Border and address the current situation at the border. The support ERO provides at the Southwest Border includes but is not limited to: transporting; processing; enrollment in alternatives to detention; removals; bedspace management of those taken into custody; and transfers of those taken into custody. This support has significantly increased over the past few months.

Lack of Clear Guidance for Nationwide Workforce

12. Without the nationwide perspective and guidance issued by HQ Enforcement and Removal Operations (ERO), individual immigration officers may prioritize cases differently based upon only their local experiences, which will of course vary. This could force ICE to revert to a policy that is not tailored to the current operational realities faced by ICE and the resources available to the agency. An injunction would also cause further confusion among the nearly 6,000 immigration officers employed by ERO regarding whether, and to what extent, any specific policy guidance applies. Absent clear priorities, ERO immigration officers may be left with only very general guidance—or no guidance at all—on the exercise of their discretion, leading to disparate prioritization across the country and a lack of consistency in enforcement actions. This could result in an undesirable shift in enforcement away from those that present the greatest risk to public safety and further undermine public confidence in the nation's immigration enforcement efforts.

13. Any potential policy or operational confusion due to an injunction could additionally harm ICE's relationship with state and local stakeholders. In particular, ICE must cultivate relationships with numerous state and local partners. To allow individual states to impose their individual preferences on all stakeholders, as Texas and Louisiana seek to do here, could not only irreparably harm ICE's relationships with its state and local partners, but also encourage other states to use the judicial process to bring additional lawsuits to further impose their individual judgment of how federal immigration enforcement should be conducted not just in their respective states, but across the entire country.

14. This confusion could, in turn, also undermine the authority of career leadership within ICE. To manage a nationwide workforce, these leaders must balance consistency in operations with changing operational needs. An injunction would impair the ability of leadership to adjust to changing conditions.

Adverse Impact on Agency's Deliberative Process

15. The injunction of the February 18 Interim Guidance sought by Plaintiffs could interfere with the agency's ongoing deliberative process. The Interim Guidance issued by Acting Director Johnson seeks to facilitate a dialogue between ICE's field offices, senior leadership, and DHS HQ, about what DHS's immigration enforcement priorities should be, and how they should be implemented. This dialogue will be informed by data, which ICE is gathering through internal approval and tracking tools that are keyed to the Interim Guidance. Requiring ICE to revert to previous policies could frustrate the agency's ability to evaluate certain enforcement priorities.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 18th day of May, 2021.

_____
Thomas Decker, Acting Assistant Director for Field Operations
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

Exhibit N

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

STATE OF TEXAS, STATE OF LOUISIANA	)	
Plaintiffs,	)	
v.	)	No. 6:21-cv-00016
UNITED STATES OF AMERICA, *et al.*	)	
Defendants.	)	

DECLARATION OF MONICA BURKE

I, Monica Burke, declare the following under 28 U.S.C. § 1746:

1. I presently serve as Acting Assistant Director of Custody Management Division (CMD), Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security (DHS or Department). I have served in this capacity since August 2, 2021. I started my career at ICE in the Office of the Principal Legal Advisor, ERO Law Division (EROLD) in 2011. I was a Section Chief and Deputy Division Chief in EROLD. Prior to my current position, I was the Deputy Assistant Director for Custody Programs within CMD from March 2020 to August 2021.

2. CMD provides policy and oversight for the administrative custody of ICE's highly transient and diverse population of immigration detainees. CMD is composed of two divisions – the Oversight Compliance and Acquisitions Division (OCAD) and the Custody Programs Division (CPD).
3. As the Assistant Director, I am responsible for the effective and proficient performance of these divisions and their various units, including the oversight of compliance with ICE's detention standards and conditions of confinement at ICE detention facilities generally. I am further responsible for managing ICE detention operations efficiently and effectively to provide for the safety, security, and care of an average of about 25,000 detainees daily at approximately 200 facilities nationwide.
4. This declaration is based on my personal knowledge and experience and information provided to me in my official capacity.
5. I have read and am familiar with the declaration of Thomas Homan submitted by Plaintiffs in this case.
6. If the court's order required ICE to arrest, take into custody, and detain all known noncitizens subject to detention under section 1226(c) or section 1231(a)(2) without the ability to prioritize the most serious offenders, ICE would need to contract and pay for orders of magnitude more detention beds than it currently possesses, especially when accounting for limitations required by the ongoing COVID-19 pandemic and pandemic guidance.
7. As an initial matter, reprogramming or transferring funds would not address the significant obstacles to identifying additional appropriate detention space. Over the past month, I have been working to identify additional beds and I am familiar with the many

challenges associated with this effort. Finding and contracting for additional detention beds is a complicated process that requires several months per facility. First, ICE must identify available facilities. Second, ICE must conduct multiple preoccupancy inspections to ensure the facility is suitable for civil immigration detainees. Third, ICE negotiates with the detention provider and awards the contract that must be funded.

8. This process is complicated by the fact that detention providers are facing challenges in hiring appropriate staff, especially medical staff, and after staff are identified, ICE needs several weeks to ensure that they have appropriate clearances.

9. Notably, some facilities have terminated their contracts with ICE during the pandemic. Further, civil immigration detention requires a heightened standard of care and Congress has regularly required DHS to monitor facilities and discontinue agreements under certain circumstances. Available facilities are also impacted by state laws prohibiting ICE detention. Further, ICE detention space is limited by ongoing litigation that enjoins ICE from using some of its detention capacity.

10. Based on the funding and operational challenges, I believe that ICE cannot readily add sufficient bedspace to accommodate the orders of magnitude of additional noncitizens that would need to be detained were the court to order it.

11. Any significant reprogramming or transferring of funds would also damage other important DHS priorities and programs. This could include funds appropriated to support important programs like Fugitive Operations and the Transportation and Removal program. Beyond the custody sphere, there are many other significant programs within DHS and ICE that could be jeopardized by a court ordered mandate to reallocate funds without regard to the department's overall mission.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 23rd day of August 2021.

MONICA S BURKE

Digitally signed by MONICA S BURKE
Date: 2021.08.23 09:40:53 -04'00'

Monica Burke
Acting Assistant Director
U.S. Immigration and Customs Enforcement

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

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

[PROPOSED] ORDER

After due consideration, Plaintiffs' motion for a delay of the effective date of agency action or, in the alternative, preliminary injunction (ECF No. 111) is **DENIED**.

It is SO ORDERED.

Signed this ___ of _____, 2021.

_____
Drew B. Tipton
United States District Judge