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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity as Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

STATE PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In President Trump's last full month in office, the Border Patrol paroled 17 aliens[1] caught at the border into the interior of the United States. One year later, President Biden's Border Patrol released over 51,000 in December 2021[2]—a mindboggling 300,882% increase. Since President Biden took office, the total number has grown to 366,000 aliens.[3]

The legal mechanism Defendants invoke to allow these aliens into the country is by refusing the detain them, as required by 8 U.S.C. § 1225(b), and instead paroling them *en masse* into the United States pursuant to 8 U.S.C. § 1182(d)(5). Defendants shamelessly claim that "no such 'policy' exists" (Doc. 146 at 25) of refusing to detain aliens and of granting blanket parole to aliens encountered at the border. Instead, Defendants' apparent position is that the *three-thousand-fold* increase is the result solely of individual determinations by field officers and not any overarching policy of the new Administration. This Court, however, is "not required to exhibit a naiveté from which ordinary citizens are free." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). The State has validly alleged a "plausible" claim that an actual policy of increasing use of parole exists; no more is required now. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

In any event, the government cannot deny that it is releasing and paroling arriving aliens by the tens of thousands, and the government cannot avoid judicial review of its widespread and unlawful practices by refusing to put them in writing, or more likely, putting them in writing and refusing to make those written policies public. *See Brotherhood of Locomotive*

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[1] "Alien" is a legal term of art used throughout the Immigration and Nationality Act ("INA") and is defined by statute to mean "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

[2] Defendant Customs and Border Protection reports these numbers on its website. Numbers for FY2022 are available at https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics, and numbers for FY2021 are available at https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2021. The numbers were calculated using the "U.S. Border Patrol – Dispositions and Transfers" tab and combining the "Notice to Appear/Order of Recognizance" and "Parole + ATD" rows. (The "Parole + ATD" row is only used in FY2022.)

[3] *Id.* The low number in December 2020 was not caused by COVID-19, as the number in January 2020 was only 76. *See* Custody and Transfer Statistics FY2020, U.S. Customs & Border Protection, https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy-2020 (U.S. Border Patrol – Dispositions and Transfers tab). In addition, because the total number of releases reported here likely does not include releases by other DHS components, the total is probably even larger.

Eng'rs & Trainmen v. Fed. R.R. Admin., 972 F.3d 83, 100 (D.C. Cir. 2020) (collecting authorities establishing that unwritten policies are subject to APA review); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339–42 (D.D.C. 2018) (reasoning that a court may infer the existence of an immigration policy where the facts suggest that one exists). Moreover, if this Court doubts the existence of a DHS policy, it should permit jurisdictional discovery into that question. *See*, *e.g.*, *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (holding that district court abused discretion in denying jurisdictional discovery where "[f]urther discovery on this issue [on appeal] might well demonstrate facts sufficient to constitute a basis for jurisdiction").

Defendants' policy clearly contravenes the applicable parole statutes. Aliens who convince an asylum officer that the alien has a credible fear of persecution "**shall be detained** for further consideration of the application for asylum." 8 U.S.C.A. § 1225(b)(1)(B)(ii) (emphasis added). Aliens who have failed to convince an asylum officer of their credible fear who seek review before an immigration judge "**shall be detained** pending a final determination." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (emphasis added). And for aliens who are "not clearly and beyond a doubt entitled to be admitted, the alien[s] **shall be detained**," subject only to limited exceptions not applicable here (for crewmen and stowaways). 8 U.S.C. § 1225(b)(2)(A) (emphasis added).

Against this backdrop of mandatory detention, Congress created a limited exception in 8 U.S.C. § 1182(d)(5)(A). That provision gives DHS the power to parole aliens into the United States, rather than detain them, but "only on a case-by-case basis for urgent *humanitarian reasons or significant public benefit*." *Id.* (emphasis added).

Defendants brazenly claim to this Court that they are not "paroling 'en masse.'" (Doc 146 at 23.) The Fifth Circuit has already held otherwise: Defendants are indeed doing just that, and "[d]eciding to parole aliens *en masse* is the opposite of [the] *case-by-case* decisionmaking" required by Section 1182(d)(5)(A). *Texas v. Biden*, 20 F.4th 928, 942 (5th Cir. 2021), as revised (Dec. 21, 2021).

A 300,882% increase in parole is itself powerful evidence that Defendants have

instituted a programmatic policy of granting parole to aliens encountered at the border (the "Parole Policy"). This is "precisely the sort of large-scale policy that's amenable to challenge using large-scale statistics and figures." *Texas*, 20 F.4th at 971. It is also evidence that Defendants are ignoring the statutory command that the government detain all aliens awaiting adjudication of their asylum claims and aliens who are "not clearly and beyond a doubt entitled to be admitted" (the "Non-Detention Policy"). 8 U.S.C. § 1225(b).

Defendants adopted these policies without any notice and comment and in violation of the APA. The Motion to Dismiss should therefore be denied.

ARGUMENT

I. The Court Should Not Dismiss Any Part of This Case As Moot

A. The November Memo Does Not Moot Plaintiffs' Claims and Merely Perpetuates Defendants' Prior Unlawful Non-Detention and Parole Policies

After Arizona filed its First Amended Complaint in this suit on October 22, 2021 challenging Defendants' policy of issuing Notices To Report ("NTRs"), they realized they could not defend that practice. On November 2, 2021, Defendant U.S. Customs and Border Protection ("CBP") issued a new memo (the "November memo"),[4] attached hereto as Exhibit A. Defendants only made the November Memo public in early December, apparently to defend this litigation and similar litigation in Florida.

The November Memo states that, "[e]ffective immediately, [Border Patrol] is ceasing the use of" NTRs. Ex. A at 2. In practice, however, the November Memo changes only Defendants' nomenclature rather than the substance of their policy—which remains the mass-granting of parole to unauthorized aliens arriving at the border. Defendants have replaced NTRs with a policy called "Parole + ATD" or "Parole and Alternative to Detention." *Id.* at 2–4. The November Memo's Parole + ATD policy still requires that aliens be released in violation of Congress's mandatory detention requirements and without initiating removal proceedings, and simply doubles down on the government's misuse of its parole authority

[4] *Florida v. United States*, 21-cv-1066, ECF 6-2, (N.D. Fla. Dec. 3, 2021). In their Motion to Dismiss, Defendants incorrectly cite the November Memo as ECF number 62, when it is actually 6-2.

under § 1182(d)(5), now merely under different terminology.

Notwithstanding Defendants' elimination of NTRs (and their implicit acknowledgment that this practice was unlawful), the November Memo still perpetuates the challenged policies. Plaintiffs' immigration-related claims challenge not only Defendants' policy of issuing NTRs, but also specifically challenge Defendants' policy of programmatically mass-granting parole to unauthorized aliens and their Non-Detention Policy of violating statutory commands about aliens who must be detained. (*E.g.* Doc. 134 ¶¶ 115–16, 121–26, 131–32, 134, 137–38, 140–43, 145, 148–49, 216–34 (factual allegations and claims related to Defendants' Parole Policy and Non-Detention Policy).) The November Memo, therefore, does not make this case moot, because it continues the same policies of not detaining unauthorized aliens and of paroling aliens *en masse*. In a letter to Representative Andy Biggs dated January 31, 2022,[5] DHS treated Parole + ATD as a continuation of its prior NTR policy. In that letter, DHS combined the number of aliens released into the country under both programs into a single category. Attached hereto as Exhibit B is a copy of the letter. In that letter, DHS admitted that "from March 21 through December 10, 2021, CBP processed 148,366 individuals with an alternate processing document at the Southwest Border. Ex. B. at 3. Of the total 148,366 aliens, 94,039, or 63.48 percent, were processed with an NTR, **while 54,327, or 36.62 percent, were processing [sic] using Parole + ATD.**" *Id.* (emphasis added).

The November Memo is a transparent attempt by Defendants to avoid responsibility for their unlawful behavior by presenting the courts ever ever-moving targets. That "approach is as unlawful as it is illogical." *Texas v. Biden*, 20 F.4th 928, 942 (5th Cir. 2021), as revised (Dec. 21, 2021). Over the last year, in the immigration context, Defendants have demonstrated a pattern of employing the same whack-a-mole tactic of "revoking" a prior policy and then implementing a nearly identical policy, all with the apparent intent of mooting out litigation and thus leaving the government undisturbed and able to continue in its unlawful activities. These tactics rightfully earned blistering criticism from the Fifth Circuit. *Id.* at 956–65 ("DHS

[5] https://twitter.com/RepAndyBiggsAZ/status/1488954416489279489

cannot moot this case by reaffirming and perpetuating the very same injury that brought the States into court."). This Court should decisively reject them too.

Just like the MPP Re-Termination of the October 29 Memorandum in *Texas v. Biden*, the November Memo does nothing to change the controversy between the parties in this case—it is "very much not dead and not gone." *Id.* at 942. Here, as in *Texas*, the government's theory of mootness would allow Defendants to simply issue a new memo *ad infinitum* and thus forever avoid judicial review. That approach is "unlawful" and "illogical," and should be rejected. *Id.*

B. If the Court Finds That Any of Plaintiffs' Claims Are Now Moot, Plaintiffs Should Be Granted Leave to Amend or to File A Supplemental Pleading

Alternatively, if this Court finds that any part of Plaintiffs' claims are now moot, the proper resolution is not dismissal, but leave to amend or leave to file a supplemental pleading, which would allow Defendants to add allegations about the new November Memo.

Defendants' Motion to Dismiss was the first attack as to the sufficiency of Plaintiffs' immigration claims, and thus any amendment to the Third Amended Complaint would be Defendants' "first opportunity to cure those deficiencies." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1183 (9th Cir. 2016). In such situations, the Ninth Circuit has held that Defendants "should be afforded an additional opportunity to present an adequate pleading" and granted leave to amend the complaint. *Id*; *see also Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment.").

Alternatively, Plaintiffs should be granted leave to file a supplemental complaint under Fed. R. Civ. P. 15(d). The purpose of a supplemental pleading is to allow a party to "set[] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense." *Id.* In this case, if the Court finds that the November Memo makes any part of Plaintiffs' claims moot, an appropriate resolution in lieu of amending the complaint would be to allow Plaintiffs to file a supplement to the Third Amended

Complaint setting forth the necessary additional factual and legal allegations to address the November Memo.

II. Plaintiffs Have Standing and Defendants' Parole and Non-Detention Policies Are Reviewable

Congress has affirmatively prohibited Defendants' actions here by enacting an explicit command in 8 U.S.C. §1225(b)(1) and (2) that imposes an unequivocal, non-discretionary mandate to either detain unauthorized aliens, return them to Mexico, or grant parole in limited circumstances, "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). This statutory scheme does *not* authorize programmatic authorizations of parole, such as Defendants' Parole and Non-Detention Policies. (*See infra* at Section III.) Congress has thus either deprived Defendants of any discretion to adopt the Parole Policy or, at a minimum, provided sufficient statutory guidelines for this Court to exercise judicial review of it.

A. Defendants' Parole and Non-Detention Policies Are Reviewable

Because Sections 1225(b) and 1182(d)(5) leave DHS with no discretion to adopt the Parole and Non-Detention Policies, the subject matter of this action cannot be "committed to agency discretion"—since no discretion exists. But even if some discretion remained under Sections 1225(b)(2) and 1182(d)(5)(A), those provisions nonetheless provide a "meaningful standard" to guide judicial review, which precludes Section 701(a)(2) from foreclosing review.

1. Because Section 1225 Eliminates All Relevant DHS Discretion, and Because Section 1182 Prohibits Programmatic Grants of Parole, The Field Covered By the Parole and Non-Detention Policies Is Not "Committed To Agency Discretion"

The proper construction of Sections 1225(b) and 1182(d)(5)(A) effectively resolves the question of reviewability. As set forth below at Section III, Section 1225(b) places an unequivocal mandate on Defendants to detain unauthorized aliens arriving at the southern border or return them to Mexico. And Section 1182(d)(5)(A) prohibits generalized programs for the grant of parole, authorizing parole only on a case-by-case basis for extraordinary circumstances. The commands of these two statutes necessarily preclude the existence of agency discretion to do otherwise, which in turn precludes these matters being "committed to

agency discretion." 5 U.S.C. § 701(a)(2). Where "enforcement provisions leave *no* discretion to determine which cases to pursue, the [agency's] enforcement decisions are not committed to agency discretion by law." *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991). Just so here.

2. In Any Event, Sections 1182 and 1225 Provide A "Meaningful Standard" To Apply For Judicial Review

Even if Section 1225(b) and 1182(d)(5)(A)'s text did not affirmatively displace discretion to adopt the challenged policies, whatever discretion remains is not so boundless as to be completely unreviewable under the APA. As the Supreme Court has made clear, the committed-to-agency-discretion exception only applies in the "*rare circumstances* where the relevant statute 'is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (emphasis added)). The Supreme Court thus "applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015).

Here there is just such a "meaningful standard" for courts to apply. Section 1225(b) affirmatively provides a specific standard against which DHS's actions can be judged: for unauthorized aliens encountered at the southern border, Defendants may either detain the aliens or return to them Mexico. Alternatively, Defendants may parole certain aliens, but "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Thus, while Defendants retain general discretion over routine matters such as detention locations, logistics about returning aliens to Mexico, and case-by-case parole determinations, there is a readily available, "meaningful standard" against which to judge the results: *i.e.*, whether aliens have been detained, returned to Mexico, or granted parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit. "Even if *Heckler* could apply in theory, [Section 1225's] text would rebut that presumption here. As the *Heckler* Court explained, 'the presumption [that nonenforcement decisions are unreviewable] may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.' That is precisely what Congress did when it phrased

§ 1225(b)(2)(A) in mandatory terms." *Texas*, 20 F.4th at 988 (quoting *Heckler*, 470 U.S. at 832–33).

Defendants argue these statutes do not provide a "meaningful standard" under *Heckler*. The Supreme Court's unanimous decision in *Mach Mining* effectively refutes this argument. There, Congress had provided that EEOC "*shall* endeavor to eliminate an alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 575 U.S. at 486 (quoting 42 U.S.C. § 2000e-5(b) (alteration omitted) (emphasis added). The Court recognized that the "shall" language was "mandatory, not precatory." *Id.* And while "the statute provides the EEOC with wide latitude over the conciliation process," that did *not* preclude judicial review. *Id.* at 488. Instead, the "shall" mandate provided "a perfectly serviceable standard for judicial review: Without any 'endeavor' at all, the EEOC would have failed to satisfy a necessary condition of litigation." *Id.*

So too here. Section 1225(b)'s "shall be detained" provides a "perfectly serviceable standard for judicial review." Section 1182(d)(5)(A) also provides just such a standard when it commands that parole be granted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." The Parole and Non-Detention Policies squarely violate those standards.

The Supreme Court's recent, also unanimous, decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) further supports Plaintiffs. The Court reiterated the "strong presumption favoring judicial review" in *Mach Mining*. *Id.* at 370. The federal government relied on language providing that the Secretary of Interior "*may* exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of designation" to make a similar unreviewability argument. *Id.* at 371 (cleaned up) (emphasis added) (quoting 16 U.S.C. §1533(b)(2)).

The Court acknowledged that "[t]he use of the word 'may' certainly confers discretion on the Secretary." *Id.* But because the statute also "require[d] the Secretary to consider economic impact and relative benefits … [t]he statute … [was] not 'drawn so that a court would have no meaningful standard against which to judge the Secretary's exercise of his

discretion." *Id.* at 371–72 (quoting *Lincoln*, 508 U.S. at 191) (cleaned up). Thus, the petitioner's claim that the government failed to adequately consider costs and benefits was "the sort of claim that federal courts routinely" review, *unanimously* reversing the Fifth Circuit's contrary committed-to-agency-discretion holding. *Id.* at 371

Plaintiffs' reviewability claim here is even stronger. Section 1225(b) has no "may" language on which Defendants can hang their unbounded discretion defense upon. And the strict limitations of Section 1182(d)(5)(A) specifically preclude programs for the widespread grant of parole such as the Parole Policy and provides a meaningful standard for evaluating case-by-case parole decisions—the grant of parole may only be made "for urgent humanitarian reasons or significant public benefit." These provide at least as much of a "meaningful standard" for courts to review than an open-ended invitation to consider costs and benefits without any further guidance as to how to do so.

3. Defendants Have Wrongly Analogized This Case to Law Enforcement Actions

Defendants attempt to analogize this case to law enforcement actions and apply the *Heckler* presumption against reviewability for challenges to agency decisions "not to take enforcement action." 470 U.S. at 832. But that analogy is inapt. The *Heckler* presumption does not apply, or is rebutted, because this case challenges a general policy, not *individual* enforcement decisions, and because the statutes provide sufficient "guidelines" for judicial review. This conclusion is bolstered because the actions are not traditional enforcement actions and judicial review is thus manageable.

a. The Presumption of Heckler Does Not Apply In the Context of a Challenge to a General Policy

At a basic level, the *Heckler* presumption of unreviewability applies to challenges to *particular* decisions not to initiate enforcement actions, not outright sweeping policies of non-enforcement. *See, e.g.*, *ILWU v. Meese*, 891 F.2d 1374, 1378 n.2 (9th Cir. 1989) (describing *Heckler* as applying to "an agency's refusal to prosecute or enforce a statute in a specific case"); *Bresgal v. Brock*, 843 F.2d 1163, 1169 n.1 (9th Cir. 1987) (same); *see also OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (explaining that "an agency's adoption of a

general enforcement policy is subject to review," thereby distinguishing *Heckler*'s presumption of unreviewability as applying only to individual cases of non-enforcement).

Here, Plaintiffs do not challenge any particular non-removals, but rather the Parole and Non-Detention Policies' broad policy of flouting Sections 1225 and 1182. In doing so, Plaintiffs "do not seek review of [DHS's] exercise of discretion; rather, they challenge the extent of [DHS's] authority under the [parole and detention] statute[s]. And the extent of that authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

The D.C. Circuit has specifically recognized that broad nonenforcement policies are reviewable under the APA. In *National Wildlife Federation v. EPA*, that court explained that "the presumption of unreviewability does not apply where there is 'law to apply'" or where a challenger asserts "a facial challenge to the [agency] statutory interpretation." 980 F.2d 765, 773 (D.C. Cir. 1992).

For those reasons, that court had jurisdiction to review a facial challenge to an EPA rule that gave it "discretion to refuse to initiate proceedings to withdraw a state's primary enforcement responsibility, or 'primacy,' for national drinking water standards." *Id.* at 767. The court *rejected* EPA's attempt to "create still another, third point of discretion" beyond the two provided by statute. *Id.* at 771. The D.C. Circuit further held that EPA's "attempt to carve out a third area of discretion [could not] be squared with the language of the statute." *Id.* "Four other courts have adopted this approach." Note, *An Abdication Approach to State Standing*, 132 Harv. L. Rev. at 1317 & n.146 (citing Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 Nw. U.L. Rev. 1171, 1188 n.104 (2018) (collecting cases)).

National Wildlife Federation strongly supports Plaintiffs here. Sections 1225 and 1182 similarly provide "law to apply" precluding the presumption of unreviewability. In addition, Defendants' attempt to engraft additional exceptions onto Section 1225 beyond the limits of 1182's parole authority is just as reviewable and unlawful as EPA's attempt in *National Wildlife Federation*. *See also* Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 Geo. L.J. 157, 162 (2014).

Defendants' challenge is further equivalent to that in *ILWU*, which the Ninth Circuit

held was reviewable. In that case, the plaintiffs sued DHS's predecessor, the INS, challenging INS's enforcement practice "of allowing alien workers to perform labor in the United States without certification by the Secretary of Labor allegedly in violation of 8 U.S.C. section 1182(a)(14)" by interpreting the meaning of the term "alien crewmen" as including the class of aliens workers at issue. *ILWU*, 891 F.2d at 1378. *ILWU* held that the INS's action was reviewable under the APA because there was "no indication that Congress sought to prohibit judicial review" and because the INS's action was not "committed to agency discretion by law." *Id.* That was so because there was "law to apply in the definitions of 'alien crewmen' and Congress' enunciated purpose" in enacting the applicable statute. *Id.*

The Ninth Circuit specifically distinguished between situations in cases like *Heckler*, where the dispute was over "an agency's refusal to prosecute or enforce a statute in a specific case," which was not reviewable, and a case where the court was instead reviewing an agency's general enforcement practice actions in light of the INA's statutory requirements. *Id.* at n.2. Thus, in *ILWU*, the Ninth Circuit held that "courts must reject an administrative construction of a statute that is inconsistent with the statutory mandate or that frustrates Congress' purpose." *Id.* at 1383. And because the INS's enforcement practices at issue in that case were contrary to the statutory mandate and to Congress's purpose, the Ninth Circuit exercised jurisdiction and reversed. *Id.* at 1383–84.

4. Even If Heckler's Presumption Regarding Specific Law Enforcement Decisions Applied, It Is Rebutted Here

Even if Defendants were correct that the *Heckler* presumption of unreviewability applied, however, that presumption is defeated here.

Indeed, *Hecker* itself makes that much plain. In that case, the Court specifically cited favorably its prior decision in *Dunlop v. Bachowski*, 421 U.S. 560, 560 (1975). Immediately after explaining that decisions not to take particular enforcement actions are presumptively not reviewable, the Court then cited *Dunlop* as "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability." *See Heckler*, 470 U.S. at 833. In *Dunlop*, the Court recognized that "the language of the [statute at issue] indicated that the Secretary was required to file suit if certain 'clearly defined' factors were present" and "[t]he

decision therefore was not "'beyond the judicial capacity to supervise.'" *Id.* at 834 (citation omitted). In *Dunlop*, those "'clearly defined' factors" were "the filing of a complaint by a union member" and the Secretary "finding probable cause to believe a violation … has occurred.'" *Id.* at 833–34 (citation omitted). The *Dunlap* Court thus concluded (and the *Heckler* Court reiterated) that "[t]he statute being administered quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Id.* at 834.

Here, Section 1225(b) provides factors that are at least as "clearly defined" as in *Dunlop*: 1) for aliens found to have a credible fear of persecution "the alien **shall be detained** for further consideration of the application for asylum"—i.e. until the asylum claim has been fully considered and adjudicated to finality, 8 U.S.C.A. § 1225(b)(1)(B)(ii) (emphasis added); 2) for aliens claiming asylum who have failed the asylum officer's credible fear review, "**[m]andatory detention**" until there has been "a final determination of credible fear of persecution and, if found not to have such a fear, until removed" 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (emphasis added) and 3) for aliens "not clearly and beyond a doubt entitled to be admitted," they "**shall be detained**." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). The relevant statutes also provide for specific conditions for non-enforcement of the detention requirement: for aliens "not clearly and beyond a doubt entitled to be admitted," there are exceptions for 1) crewmen; 2) stowaways; 3) "aliens arriving from contiguous territory," who may be returned to the foreign territory in lieu of detention; and 4) temporary parole. 8 U.S.C. § 1225(b)(2)(B) and (C); 8 U.S.C. § 1182(d)(5). For aliens claiming asylum, the only exception to the detention requirement is temporary parole. 8 U.S.C. § 1182(d)(5). The standard for temporary parole is also clearly defined: "**only** on a **case-by-case** basis for **urgent humanitarian reasons or significant public benefit**." *Id.* (emphasis added).

These clearly defined factors thus "provided guidelines for exercise of [DHS's] enforcement power" that rebuts any presumption of unreviewability. *Heckler*, 470 U.S. at 834. And that conclusion is further supported by all of the statutory construction factors discussed below at Section III, which militate against any conclusion that Section 1225 and 1182's "language or structure demonstrates that Congress wanted an agency to police its own

conduct." *Mach Mining*, 575 U.S. at 486.

5. Reviewability Is Bolstered By The Nature Of the "Enforcement" At Issue Here.

At a general level, this context—mandatory detention after an immigration officer has made the necessary findings about an alien—is not the sort of law-enforcement action that is typically unreviewable. This case has nothing to do with what crimes/violations to investigate or charge, for which meaningful standards for courts to apply are scarce. Instead, it relates solely to whether mandatory commands in the statute will be carried out or willfully defied.

This case is thus more akin to the Bureau of Prisons (1) deciding that it disapproves of federal securities fraud crimes on policy/political grounds and (2) asserting unreviewable discretion to refuse to carry out final securities-fraud-based sentences of imprisonment imposed by district courts. Such a claim would rightfully be met with scorn by federal courts. The Non-Detention and Parole Policy's equivalently audacious pretense should be too.

B. Plaintiffs Have Standing

Defendants appear to take the position that no State has standing to challenge DHS's sudden change in policy on carrying out the immigration laws and also that no State suffers irreparable injury from the predictable consequences of DHS's actions. Not so. Defendants recently made similar arguments in this Court, and those arguments were soundly rejected. *Arizona v. DHS*, 2021 WL 2787930, at *6-*8 (D. Ariz. June 30, 2021) (Bolton, J.) (finding Arizona to have standing in challenge to DHS's interim guidance that imposed an effective moratorium on removals).

Plaintiffs have alleged three specific bases for standing and irreparable harm: 1) increased costs from the incarceration of aliens (Doc. 134 ¶¶ 145–146); 2) increased law enforcement costs, including costs from the "the pursuit of suspected unauthorized aliens" (*Id.* ¶ 147); and 3) increased costs from emergency medical services provided to aliens (*Id.* ¶¶ 148–149). The U.S. Supreme Court recognizes that a state may assert injuries based on "the predictable effect of Government action on the decisions of third parties." *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019). The majority of these costs are not reimbursed by the U.S. Government. These unrecoverable financial injuries constitute "irreparable harm."

E.g., *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020).

"[L]ax enforcement of the laws barring entry into this country ... has resulted in the creation of a substantial 'shadow population' of illegal migrants—numbering in the millions—within our borders." *Plyler v. Doe*, 457 U.S. 202, 218 (1982). The laxer the enforcement, the greater the incentive to illegally immigrate. Law enforcement officers in Arizona have observed that Defendants' lax enforcement has led to an "increase in incidents" and concomitant "increase in costs" from unauthorized aliens because Defendants' failure to enforce immigration laws "incentivize[s] individuals to illegally cross the border into Arizona" and "further exacerbate[s] the current increase in law enforcement costs" in Arizona. *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, ECF 17, Ex. N ¶ 8 (D. Ariz. March 12, 2021).[6]

Federal law requires that, as a condition of participating in Medicaid, Arizona hospitals provide emergency services to individuals regardless of immigration status. *See* 42 U.S.C. § 1395dd; 42 C.F.R. § 440.255. This means that Arizona spends money to provide these services to unauthorized aliens whenever they require emergency care. Just one southern Arizona facility near the border, Yuma Regional Medical Center (YRMC), provided care to at least 111 patients in ICE custody, alone, in February, March, and April 2021. *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, ECF 64-5 at 7-10 (D. Ariz. March 7, 2021). In February and March 2021—*i.e.*, immediately after Defendants virtually stopped enforcing all immigration laws—YRMC incurred the first and fourth-highest amount of relevant charges of the past twelve months: $591,610 for February alone—$152,014 higher than the next-highest month and dramatically exceeding the $231,602 average for May 2020-January 2021. *Id.* at 10. Because the Non-Detention and Parole Policies encourage greater illegal immigration, it is reasonable to infer that health care costs for unauthorized aliens will increase even more.

Defendants' traceability and redressability arguments also fail. As an initial matter, those requirements are doubly relaxed in cases such as this one. Those requirements are first

[6] Because Defendants have made factual challenges to subject-matter jurisdiction in this case, and have relied upon material outside the pleadings (Doc. 146 at 3 n.3), Plaintiffs similarly cite publicly available material outside the pleadings to refute Defendants' challenge to standing and jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

relaxed because the State is asserting procedural rights, specifically that Defendants' actions were arbitrary and capricious and failed to follow notice and comment under the APA. *California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018). They are further relaxed because the State is "entitled to 'special solicitude' in the standing analysis." *Texas*, 20 F.4th at 969 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

Plaintiffs' standing allegations are sufficient even under the ordinary Article III inquiry and plainly so under the doubly relaxed standards here. Plaintiffs' injuries are ongoing and will increase the longer the Non-Detention and Parole Policies are in effect, making them redressable by an order invalidating the Policies.

Defendant's contention that any injuries suffered by Plaintiffs are caused by the "acts of third parties" (Doc. 146 at 7) also fails. The Ninth Circuit has rejected this argument in similar circumstances, holding that "an increased demand for aid supplied by the state and local entities" sufficed. *City and County of San Francisco v. USCIS,* 981 F.3d 742, 754 (9th Cir. 2020). Similarly, the Ninth Circuit found plaintiffs had standing where "the defendant's behavior has frustrated its mission and caused it to divert resources in response." *East Bay Sanctuary Covenant*, 950 F.3d at 1265.

Additionally, because Plaintiffs are not alleging a mere increase in population, the portion of *Arpaio v. Obama*, 797 F.3d 11, 20 (D.C. Cir. 2015), on which Defendants base their contentions, is inapplicable here. Moreover, the causal chain is *far* less attenuated here, as *Arpaio* was relying on an inducement theory while the State here is alleging that Defendants are directly releasing immigrants into the United States. In addition, the concurrence in *Arpaio* explained that the result would likely have been different in that case if a state had been a plaintiff: "Without the laxity afforded to state litigants, Sheriff Arpaio's arguments for causation are overly speculative." *Id.* at 27 (Brown, J., concurring).

C. No Statutes Bar Review

Defendants are incorrect when they claim that 8 U.S.C. § 1252(g) bars review. That provision does not apply because this case is not brought "by or on behalf of any alien." 8 U.S.C. § 1252(g). Nor does this case "aris[e] from" a "decision or action ... to commence

proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. § 1252(g). On the contrary, it arises from Defendants' failure to detain aliens already adjudicated by immigration officers as requiring detention, and also Defendants' creation of an unlawful policy to grant parole on a programmatic, rather than case-by-case, basis.

Nor does Section 1252(a)(2)(b)(ii) bar this suit. Defendants concede that this section applies only to "individual decisions to release noncitizens on parole." (Doc. 146 at 15.) Plaintiffs do not challenge any individual decision, but rather Defendants' programmatic shift in application of the parole statute. Section 1252(a)(2)(b)(ii) therefore does not apply here. Furthermore, Defendants are incorrect when they assert that "[t]he court would similarly lack jurisdiction over any challenge to a parole policy or procedure." *Id.* In support of this proposition, Defendants rely on out-of-circuit precedent that was about an entirely different issue, specifically, whether the federal government was required to inform aliens facing removal of the availability of parole and whether aliens were entitled to a parole hearing. These issues are not relevant to this case.

Furthermore, the Ninth Circuit specifically has held that parties *do* have standing to challenge "programmatic shift[s]" in immigration enforcement even if they could not challenge "individual ... decisions." *Regents of the Univ. of Cali. v. DHS*, 908 F.3d 476, 503 (9th Cir. 2018), rev'd in part on other grounds, 140 S. Ct. 1891 (2020).[7] That is exactly this suit: a challenge to Defendants' programmatic shift in immigration enforcement.

III. The Detention Policy and the Parole Policy Are Unlawful

A. The Parole Policy and Non-Detention Policy Exist and Are Being Zealously Implemented

With respect to the Parole and Non-Detention Policies, Defendants insist that "no such 'policy' exists." (Doc. 146 at 25.) However, all available facts (such as the tens of thousands of aliens Defendants are releasing into the United States every month) show exactly the contrary—the policies exist and are being zealously implemented. At a bare minimum, the truly staggering numbers involved mean that the State's allegations have at least crossed "'the

[7] The Supreme Court affirmed the Ninth Circuit's holding that the policy at issue was reviewable, while reversing in part on merits grounds.

line from conceivable to plausible.'" *Iqbal*, 556 U.S. at 683 (citation omitted). No more is required at this stage.

Moreover, if the Court were inclined to credit Defendants' protestations about the policies' nonexistence, then this would be a factual question requiring discovery, and not dismissal. Defendants' own publicly released statistics show that they are releasing and paroling arriving aliens by the tens of thousands.

Defendants cannot avoid judicial review of its widespread and unlawful practices by refusing to put them in writing, or more likely, putting them in writing and refusing to make them public. *See Bhd. of Locomotive Eng'rs*, 972 F.3d at 100 (collecting authorities establishing that unwritten policies are subject to APA review); *Damus*, 313 F. Supp. 3d at 339–42 (reasoning that a court may infer the existence of an immigration policy where the facts suggest that one exists).

The Biden Administration's campaign to release tens of thousands of aliens at the border every month particularly harms a border state like Arizona, which shares a 370-mile border with Mexico. Defendants do not break down alien release numbers by state, but there can be little doubt that thousands of aliens are being released into Arizona, even though Defendants are required by statute to detain them or return them to Mexico. This harms the State's quasi-sovereign and proprietary interests, forcing it to incur millions of dollars in expenses in law enforcement and medical costs.

A recent video demonstrates that federal immigration officials are not just unlawfully releasing migrants, they are affirmatively assisting them in resettling around the country, including in Arizona.[8] In the video, federal immigration officials are seen transporting large groups of adult males by bus, and then by taxi, to an airport in the border city of Brownsville, Texas.[9] According to the government, TSA is even accepting immigration arrest warrants as

[8] @BillFOXLA, Twitter (Jan. 25, 2022, 8:05 AM), https://mobile.twitter.com/BillFOXLA/status/1485992229017731077 .

[9] The video is difficult to reconcile with public statements from the Biden Administration—not to mention representations made in this litigation—that the federal government is expelling single adults under its public health authority given the COVID-19 pandemic, and therefore not processing them under the immigration laws. *See* Adam Shaw, *DeSantis requests Biden administration stop resettling illegal immigrants in Florida*, Fox News (Aug. 28, 2021),

identification sufficient to board a domestic flight.[10]

B. The November Memo Continues and Strengthens the Parole and Non-Detention Policies

In an attempt to escape accountability for their unlawful Parole Policy, the November Memo repeats the words "case-by-case" as if invocation of this incantation can somehow legalize their unlawful policy. It cannot. Indeed, that same November Memo makes the prior blanket parole program even more explicit, delegating unlimited authority to the Chief Patrol Agents of the Del Rio and Rio Grande Valley sectors of the CBP to grant parole whenever the following two conditions are met: 1) "The average [Time-In-Custody] in the sector exceeds 72 hours AND the number of subjects who were taken into custody in the sector during the preceding 48 hours exceeds the number of individuals booked out in the same period"; and 2) "The sector exceeds 100% of the total non-COVID detention capacity AND the number of subjects who were taken into custody in the sector during the preceding 48 hours exceeds the number of individuals booked out in the same period." Ex. A at 3.

This is the creation of a programmatic parole policy. Imposition of these blanket conditions as a standard for authorizing the unrestricted grant of parole to all aliens violates Section 1182)(d)(5)'s "case-by-case" requirement.

For other CBP sectors, the November Memo adds the additional step of requiring authorization from the U.S. Border Patrol Chief ("USBP") and the CBP Commissioner, but it makes clear that blanket parole authority will be granted whenever there are "capacity constraints ... in order to avoid crowding in CBP facilities." Ex. A at 3.

Reading between the lines, the message of the November Memo is clear: do not detain aliens and always grant parole as widely as possible. The administrative record will likely show that Defendants are granting parole on a programmatic basis to virtually all aliens released into the United States, in complete disregard for the clear statutory language and clear

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https://www.foxnews.com/politics/desantis-biden-administration-resettling-illegal-immigrants-florida; (Doc. 146 at 4 ("[A]lternative processing is not available to individuals . . . covered by" the CDC's "Title 42 Order.").)

[10] Adam Shaw et al., *TSA confirms it lets illegal immigrants use arrest warrants as ID in airports*, Fox News (Jan. 21, 2022), https://www.foxnews.com/politics/tsa-confirms-allows-illegal-immigrants-arrest-warrants-id-airports.

congressional intent that parole be only granted on a limited case-by-case basis. Dismissal is thus inappropriate.

C. The Parole and Non-Detention Policies Violate Sections 1225 and 1182, Which Require Mandatory Detention and Strictly Limit Parole

The INA does not explicitly or implicitly create any authority in the executive branch that includes the ability to create an entire program that categorically considers applicants for parole. Congress does not "hide elephants in mouseholes" like that. *Whitman v. Am. Trucking Assins*, 531 U.S. 457, 468 (2001); *Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021). If it did, there would be no limit on the number of aliens who could be brought into the United States. Any administration could circumvent all caps set on immigration levels by simply determining general categories that constitute a "significant public benefit" or a "urgent humanitarian reason," reviewing an application from each applicant, and paroling all applicants because the administration desires such a result. Such a result is directly contrary to the plain text and legislative history of the parole statute.

All arriving aliens, even those claiming asylum, are required by law to be detained pending a decision as to whether they have a valid basis to enter the United States. See 8 U.S.C. § 1225(b)(2)(A) and (b)(1)(B). That decision is made via immigration proceedings—often called "removal proceedings"—before an immigration judge. In expedited removal proceedings, a decision can be made quickly. If the government chooses not to use expedited removal, it can take much longer. Either way, Congress has commanded the Executive Branch to detain arriving aliens until a final decision is made regarding removal. Section 1225 "sets forth a general, plainly obligatory rule: detention for aliens seeking admission." *Texas*, 20 F.4th at 996. In short, whether the alien falls under (b)(1) or (b)(2), whether the alien applies for asylum or not, and whether the alien passes a credible-fear screening or not, the alien is subject to mandatory detention. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("Read most naturally, §§ 1225(b)(1) and (b)(2) . . . *mandate detention* of applications for admission until [their] proceedings have concluded." (emphasis added)); *accord Texas v. Biden*, 20 F.4th at 996 (explaining that § 1225 "sets forth a general, plainly obligatory rule: detention for aliens seeking admission").

The rule makes good sense. "[M]ost aliens lack[] meritorious claims for asylum," as "only 14 percent of aliens who claimed credible fear of persecution or torture were granted asylum between Fiscal Year 2008 and Fiscal Year 2019." *Texas v. Biden*, 2021 WL 3603341, at *4 (N.D. Tex. Aug. 13, 2021). This is, in part, because many aliens claim asylum in bad faith hoping to be released into the interior of the United States and abscond. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,946 (Nov. 9, 2018) (explaining that in FY2018, a staggering 31% of those who were released after passing an initial asylum screening—called a "credible-fear screening"—absconded and did not appear at their immigration hearings).

There are two exceptions to this mandatory detention rule. First, there is one (and only one) "circumstance[] under which" these arriving aliens "may be released" into the United States: when the federal government exercises its "temporary parole" authority. *Jennings*, 138 S. Ct. at 844 (discussing 8 U.S.C. § 1182(d)(5)(A)). But that authority may be used "only on a case-by-case basis" and only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). "Quintessential modern uses of the parole power include, for example, paroling aliens who do not qualify for an admission category but have an urgent need for medical care in the United States and paroling aliens who qualify for a visa but are waiting for it to become available." *Texas*, 20 F.4th at 947. But the government "cannot use that power to parole aliens *en masse*." *Id.* at 997.

Second, § 1225(b)(2)(C) allows the government to "return ... aliens" who "arriv[e] on land ... from a foreign territory contiguous to the United States ... to that territory pending" immigration proceedings. In other words, when migrants arrive at the southern border and claim asylum, the federal government may—instead of detaining them—require them to wait in Mexico while their claims are adjudicated. Congress did not confer on Defendants the discretion to refuse to detain aliens. Rather, Congress provided the alternative of returning those aliens to Mexico. And the policy to do just that, the MPP, worked extraordinarily well—the Trump administration only needed to grant parole to 17 aliens in December 2021. That Defendants refuse to use the only available statutory alternative to detention does not absolve

them of their obligation to detain. *Texas*, 20 F.4th at 996 (Defendants simply "don't want to do [the] one thing Congress allowed" as an alternative to detention).

When Congress amended Section 1225(b) in 1996, it created a "*de facto* mandatory detention regime." *Tineo v. Ashcroft*, 350 F.3d 382, 398 (3d Cir. 2003). The Third Circuit provided the following summary of the combined effect of Section 1225(b)'s mandatory detention rules and 1182(d)(5)'s limits on parole: "§ [1225](b)(2) requires the INS to detain aliens 'not clearly and beyond a doubt entitled to be admitted' and because of the limited grounds for parole in § [1182](d)(5)(A), in practice, these provisions often result in ... mandatory detention." *Id.* at 387.

Even though Congress has spoken unambiguously, the Biden Administration is willfully ignoring these requirements. It has released at least 366,000 illegal border crossers since taking office.[11]

According to the November memo, § 1182's "urgent humanitarian reasons or significant public benefit" condition is satisfied by the "need to protect the workforce, migrants, and American public against the spread of COVID-19 that may be exacerbated by overcrowding in CBP facilities." Ex. A at 3. In other words, the government is claiming that any time "capacity constraints or conditions in custody warrant ... more expeditious" processing, it can ignore the requirements of the immigration laws because those conditions present either "urgent humanitarian reasons" or a "significant public benefit" justifying parole. *Id.*; 8 U.S.C. § 1182(d)(5)(A).

However, Defendants "cannot use [the parole] power to parole aliens en masse," *Texas*, 20 F.4th at 997, which is precisely what the Parole + ATD policy purports to authorize. But even if the government's understanding of "urgent humanitarian reasons" or "significant public benefit" were accurate (it is not), Parole + ATD fails to satisfy the "case-by-case" requirement. *See* 8 U.S.C. § 1182(d)(5)(A). For example, the Biden Administration released over 18,000 migrants in December 2021 using Parole + ATD—more than one-third of the aliens who were encountered at the border and released into the United States during the

[11] *See supra* note 2.

month.[12] Over 550 grants of parole per day is not what Congress had in mind when it amended that provision to add the case-by-case requirement. *See Cruz-Miguel v. Holder*, 650 F.3d 189, 199 n.15 (2d Cir. 2011) (explaining that "this change was animated by concern that parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy").

Moreover, the Parole + ATD policy is a clear attempt to continue the notice to report policy of declining to issue charging documents. Specifically, "as a condition of their parole," individuals processed using Parole + ATD are "required to report to ICE within 15 days to be processed for" a notice to appear. Ex. A at 3. The failure to issue charging documents immediately has important consequences. Once a charging document is served, an alien who fails to appear for his removal proceedings and instead absconds can be "ordered removed *in absentia*." *Texas*, 2021 WL 3603341, at *4. After this occurs, the alien can be quickly and easily removed whenever DHS locates him because he already has a final order of removal. By contrast, DHS cannot obtain a final order of removal for an alien who is not issued a charging document.

What's worse, DHS knows that its NTR and Parole + ATD policies are failures, yet continues to implement them. According to DHS's own numbers, from March 21 through December 10, 2021, 148,366 individuals were either issued NTRs or were granted Parole + ATD (which required the alien to return to DHS to receive a Notice to Appear). Of those 148,366 aliens, only "108,069 have complied with or are within the check-in window." Ex. B at 3. In other words, nearly 30% failed to check in. And because these numbers include aliens still within their "check-in window," the number of absconders will likely end up being much higher.

Finally, the government's rationale regarding the "need to protect the workforce, migrants, and American public against the spread of COVID-19 that may be exacerbated by overcrowding in CBP facilities," Ex. A at 3, is an implausible basis for the Parole + ATD policy given the CDC's Title 42 Order, which addresses those concerns and which this

[12] *See supra* note 2.

Administration has not taken full advantage of. *See* Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806 (Oct. 13, 2020) (exercising the CDC's power under 42 U.S.C. §§ 265, 268 to suspend the introduction of migrants into the United States to protect public health).

Taking the challenged policies together, the government is violating clear congressional commands *tens of thousands of times* each month. And it has done so by transforming an exception that can only be lawfully used on a "case-by-case basis" in extraordinary circumstances into one now unlawfully used in virtually all circumstances. This massive change is itself enough to prove the Policies' existence. "Defendants cannot claim that the [policy has not changed], and yet, at the same time, provide no explanation for the sudden shift in the day-to-day treatment of asylum-seekers under the current administration." *Damus*, 313 F. Supp. 3d at 340.

Moreover, the government has flatly refused to use its power under § 1225(b)(2)(C) to "return ... alien[s]" who "arriv[e] on land ... from a foreign territory contiguous to the United States ... to that territory pending" immigration proceedings. As the Fifth Circuit recently held, Defendants simply "don't want to do [the] one thing Congress allowed" as an alternative to detention. *Texas*, 20 F.4th at 996. They have instead terminated the program under that provision—known as the "Migrant Protection Protocols" or the "wait in Mexico policy"—even though that program was incredibly effective. *See Texas*, 2021 WL 3603341 at *5 (discussing an October 2019 assessment of that program, in which the government found this policy "effective[]" and an "indispensable tool in addressing the ongoing crisis at the southern border").

Defendants claim two separate justifications for their Non-Detention and Parole Policies: 1) executive discretion, and 2) the parole authority of Section 1182(d)(5). Neither justification is legitimate. Section 1225(b) eliminates all discretion and makes detention mandatory. And Section 1182(d)(5) strictly limits Defendants' discretion and specifically prohibits broad programs for granting parole.

1. Plain Text

The plain text of Section 1225(b) establishes that DHS has a non-discretionary duty to detain aliens awaiting adjudication of their asylum claim and aliens who are "not clearly and beyond a doubt entitled to be admitted." That section's "shall's" means just that: an actual mandate and not just a readily ignorable suggestion. Indeed, the title for Section 1225(b)(1)(iii)(IV) is "**Mandatory** detention." *See*, *Ram v. INS*, 243 F.3d 510, 514 n.3 (9th Cir. 2001) (section headings and titles "may be used to interpret its meaning").

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n. 9 (1995). That accords with the definitions of dictionaries, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." Shall, Black's Law Dictionary (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, promise, requirement, or obligation." Shall, American Heritage Dictionary (5th ed. 2012).

The Supreme Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations.'" *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (cleaned up) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to administrative discretion.

The plain text of Section 1225(b) therefore creates an unequivocal obligation to detain aliens awaiting adjudication of their asylum claim and aliens who are "not clearly and beyond a doubt entitled to be admitted," unless its explicit exceptions are satisfied (and DHS does not even attempt to claim it is, as the only applicable exceptions concern crewmen and stowaways, 8 U.S.C. § 1225(b)(2)(B), and aliens returned to Mexico to await their asylum decisions, 8

U.S.C. § 1225(b)(2)(C)). Defendants thus lack any discretion not to detain such aliens—let alone so unbounded discretion as to be completely unreviewable by courts.

Section 1182(d)(5) does confer some discretion on the Secretary of Homeland Security, but then immediately sets strict limits on that discretion: "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." Setting a broad policy to parole aliens *en masse* falls well outside the plain meaning of the Section 1182's limits.

2. Expressio Unius

The *expressio unius* canon of construction confirms what Section 1225's text already makes plain. Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings*, 138 S. Ct. at 844. Thus, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (citation omitted)); *accord Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc).

Under *expressio unius*, the enumeration of specific, enumerated exceptions to Section 1225(b)'s detention mandate means, quite simply, that only those exception exist. For aliens "not clearly and beyond a doubt entitled to be admitted," the only exceptions are for 1) crewmen; 2) stowaways; 3) "aliens arriving from contiguous territory," who may be returned to the foreign territory in lieu of detention; and 4) aliens granted temporary parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1225(b)(2)(B) and (C); 8 U.S.C. § 1182(d)(5). For aliens claiming asylum, the only exception to the detention requirement is temporary parole granted "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5). Defendants' discretion under the parole authority is strictly limited: it may only be exercised "on a case-by-case," not programmatically. *Id.* Parole may not be granted for any reason conjured up by Defendants; it most definitely cannot be granted based on Defendants' policy preferences or for the political expediency of the Administration. It may only be granted "for urgent humanitarian reasons or significant public benefit." *Id.*

Defendants, on the other hand, claim there exists an additional, unwritten exception

granting them unlimited discretion "over decisions regarding detention and removal of noncitizens." (Doc. 146 at 28.) The *expressio unius* canon strongly militates against reading in any additional exceptions, let alone such a sweeping unbounded one. The Supreme Court agrees: "the Attorney General may 'for urgent humanitarian reasons or significant public benefit' temporarily parole aliens detained under §§ 1225(b)(1) and (b)(2). 8 U.S.C. § 1182(d)(5)(A). That express exception to detention implies that *there are no other circumstances under which aliens detained under § 1225(b) may be released*." *Jennings*, 138 S. Ct. at 844 (emphasis added).

Application of the *expressio unius* canon is particularly appropriate here, as "[a]n implied exception to an express statute is justifiable only when it comports with the basic purpose of the statute." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017) (citation omitted). But DHS's conjured exception does no such thing: instead it swallows the rest of the Section 1225(b) and renders it a nullity. Moreover, as discussed next, it is directly contrary to the purposes of the 1996 amendments that enacted it.

3. Legislative History/Amendments and Context

The legislative history, including the specific amendments to Sections 1225 and 1182 to make them more stringent, as well as later laws adopted by Congress requiring DHS to achieve and maintain operational control of the border, strongly support Plaintiffs' interpretation as well.

a. 1996 Amendments to Statutory Text

Congress adopted the current versions of Sections 1225(b) and 1182(d)(5) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The changes made to the text of Sections 1225 and 1182 in IIRIRA make plain Congress's intent to constrain sharply the discretion of the Attorney General (and now DHS).[13]

Prior to IIRIRA, the INA contained *no* detention requirement for aliens claiming asylum. *Compare* 8 U.S.C. § 1225 (1996) *with* 8 U.S.C. § 1225. IIRIRA amended Section 1225

[13] Before the creation of DHS in 2002, most of the immigration authorities granted by statute to the Secretary of Homeland Security were vested in the Attorney General. In the INA, the Secretary of Homeland Security now stands in the place of the Attorney General and possesses those authorities and obligations originally conferred on the Attorney General.

to require "[m]andatory detention" and impose the requirement that aliens "shall be detained." 302. IIRIRA, PL 104–208, September 30, 1996, 110 Stat 3009, § 302.

Similarly, the detention requirement for aliens not "clearly and beyond a doubt entitled" to be admitted was strengthened. Before IIRIRA, such aliens were detained only until completion of a "further inquiry to be conducted by a special inquiry officer," 8 U.S.C. § 1225(b) (1996), who was just a regular immigration officer who had been designated to conduct certain "classes of proceedings." 8 U.S.C. § 1101(b)(4) (1996). IIRIRA changed this to instead require the alien's detention until removal proceedings before an immigration judge. IIRIRA, PL 104–208, September 30, 1996, 110 Stat 3009, § 304.

Congress thus replaced language that granted broad discretion about whether to detain with strict, unequivocal commands that aliens "shall be detained." 8 U.S.C. § 1225(b)(2)(A). In the case of aliens requesting asylum, it imposed a new "[m]andatory detention" requirement that such aliens "shall be detained." 8 U.S.C. § 1225(b)(1)(B)(ii) and (b)(1)(B)(iii)(IV).

IIRIRA also severely restricted the parole authority. Pre-IIRIRA, the INA granted broad parole authority to the Attorney General "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." 8 U.S.C. § 1182(d)(5) (1996). IIRIRA amended the INA "by striking 'for emergent reasons or for reasons deemed strictly in the public interest' and inserting '**only** on a **case-by-case** basis for **urgent humanitarian reasons or significant public benefit**.'" IIRIRA, PL 104–208, September 30, 1996, 110 Stat 3009, § 602 (emphasis added).

Congress thus eliminated its prior broad grant of authority to grant parole "for emergent reasons" and strictly limited the conditions under which parole could be granted, and specifically forbad programmatic parole policies, instead requiring that parole be granted "only on a case-by-case basis." 8 U.S.C. § 1182(d)(5). Congress made crystal clear its intent that this amendment limit the use of parole: the section heading in IIRIRA that makes this amendment is titled "LIMITATION ON USE OF PAROLE." IIRIRA, PL 104–208, September 30, 1996, 110 Stat 3009, § 602 (emphasis added); *see also, Ram*, 243 F.3d at 514 n.3 (section headings and titles "may be used to interpret its meaning").

Congress's intent that aliens be detained mandatorily, and that Defendants prioritize this command, is confirmed by other statutory changes. For example, IIRIRA also added a new section to the INA which commands that the Attorney General "**shall** arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation 'Immigration and Naturalization Service--Salaries and Expenses', without regard to section 6101 of Title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention." IIRIRA, PL 104–208, September 30, 1996, 110 Stat 3009, § 305, codified at 8 U.S.C. § 1231(g) (emphasis added). Congress also required in IIRIRA that "the Attorney General shall provide for an increase in the detention facilities" and that "every 6 months ... the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and of the Senate estimating the amount of detention space that will be required." IIRIRA, PL 104–208, September 30, 1996, 110 Stat 3009, § 306, 8 U.S.C.A. § 1368(a) and (b)(1).

b. Legislative History, Intent, And Context

The legislative history, and cases examining it, confirms the intent already evident from IIRIRA's text. "Congress enacted [IIRIRA] in a comprehensive effort to strengthen and tighten the immigration laws." *Arevalo v. Ashcroft*, 344 F.3d 1, 4 (1st Cir. 2003). The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the United States by ... reforming exclusion and deportation law and procedures." H.R. Rep. No. 104-828, at 1 and 199 (1996) (Conf. Rep.). President Clinton's signing statement likewise described IIRIRA as "landmark immigration reform legislation that ... strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system." 32 Weekly Comp. Pres. Doc. 1935, 1996 U.S.C.C.A.N. 3388, 3391 (Sep. 30, 1996).

"Congress, in IIRIRA, specifically narrowed the executive's discretion under §

1182(d)(5)(A) to grant 'parole into the United States,...'" *Cruz-Miguel*, 650 F.3d at 199. "The legislative history indicates that this change was animated by concern that parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy." *Id.* at n.15 (citing H.R.Rep. No. 104–169, pt. 1, at 140–41 (1996)). "Congress responded in IIRIRA by narrowing the circumstances in which aliens could qualify for 'parole into the United States' under § 1182(d)(5)(A)...." *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007).

The IIRIRA House Conference Report also supports Plaintiffs' reading of the statutes at issue. The Report explains that the intended meaning of Section 1225(b)(1) is that "[i]f the officer finds that the alien has a credible fear of persecution, the alien **shall be detained** for further consideration of the application for asylum under normal non-expedited removal proceedings." H.R. CONF. REP. 104-828, 209 (emphasis added). Similarly, the Report explains that "[t]hroughout this process of administrative review [of the asylum application], the alien **shall be detained**." H.R. CONF. REP. 104-828, 209 (emphasis added).

Similarly, the Report makes clear that Congress intended the amendment to Section 1182(d)(5) to limit the parole authority: "the Attorney General's parole authority **may be exercised only** on a case-by-case basis for urgent humanitarian reasons or significant public benefit." H.R. CONF. REP. 104-828, 245 (emphasis added). The House Judiciary Committee Report on IIRIRA further explained the purpose for the amendment to Section 1182(d)(5):

> The text of section [1182](d)(5) is clear that the parole authority was intended to be used on a case-by-case basis to meet specific needs, **and not as a supplement to Congressionally-established immigration policy**. In recent years, however, parole has been used increasingly to admit entire categories of aliens who do not qualify for admission under any other category in immigration law, with the intent that they will remain permanently in the United States. **This contravenes the intent of section 212(d)(5), but also illustrates why further, specific limitations on the Attorney General's discretion are necessary.**

H.R. REP. 104-469, 140 (emphasis added).

Defendants' interpretation of Sections 1225 and 1182 as making detention entirely discretionary and imposing virtually no limits on the parole authority thwarts Congress's intent: while IIRIRA was intended to strengthen immigration enforcement, Defendants invoke its provisions to assert unlimited and unreviewable discretion to eviscerate

enforcement and practically open the border. That is neither what Congress intended nor what Congress's text can bear.

c. The Secure Fence Act of 2006

In 2006, Congress passed the Secure Fence Act of 2006, which requires the DHS Secretary to "take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States." Secure Fence Act of 2006, PL 109-367, October 26, 2006, 120 Stat 2638. The bill specifically defines "operational control" to mean "the prevention of *all unlawful entries* into the United States, including entries by terrorists, *other unlawful aliens*, instruments of terrorism, narcotics, and other contraband." *Id.* (emphasis added).

The Secure Fence Act remains in force. It enjoyed bipartisan support in both houses of Congress, and passed in the Senate by an 80-19 vote, including with the backing of then-Senator Biden.[14]

Congress made its intent plain in the Secure Fence Act: DHS must "take all actions ... [to] prevent[] ... all unlawful entries into the United States."

Given this clear statutory language and legislative history, Defendants' contention that Congress intended to preclude all judicial review of its policies specifically intended to defy the Secure Fence Act's mandate blinks reality. Congress has made clear, again and again, that in this context, DHS has no discretion. As such, DHS cannot satisfy its "heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision." *Dunlop*, 421 U.S. at 567.

4. Case Law Interpreting Sections 1225 and 1182

Given that the text, canons of interpretation, and legislative history and intent all point in a single direction, it is perhaps unsurprising that seemingly all judicial opinions construing Section 1225(b) and 1182(d)(5) have uniformly come to the same conclusion as Plaintiffs. Indeed, because those decisions include binding precedents of the Supreme Court, this Court could resolve this central interpretive question simply by reference to precedent alone.

[14] https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00262#top

The Supreme Court has explained that Section 1225 has "clear language" that requires detention: "[r]ead most naturally, §§ 1225(b)(1) and (b)(2) … **mandate detention** of applicants for admission until certain proceedings have concluded." *Jennings*, 138 S. Ct. at 842 (emphasis added).

The Ninth Circuit has also held that Section 1225(b)'s detention command is mandatory: Sections "1225(b)(1) and (b)(2) use the phrase 'shall'.... [t]hus, the ... provisions are **clearly mandatory.**" *Aleman Gonzalez v. Barr*, 955 F.3d 762, 772, 774 (9th Cir. 2020), *cert. granted sub nom. Garland v. Gonzalez*, 210 L. Ed. 2d 1009 (Aug. 23, 2021)(referring to "**mandatory** detention pursuant to § 1225(b)") (emphasis added); *see also Thuraissigiam v. DHS*, 917 F.3d 1097, 1101 (9th Cir. 2019), rev'd and remanded on other grounds, 140 S. Ct. 1959 (2020) (citing Section 1225 and explaining that "[a]ll individuals placed in expedited removal proceedings are subject to **mandatory detention** pending a final determination of credible fear of persecution or until they are removed' (emphasis added)); *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (describing "the **mandatory detention** provision contained in 8 U.S.C. § 1225(b)(1)(B)(iii)(IV)" (emphasis added)).

Other circuit courts interpreting the meaning of Section 1225(b) have come to the same conclusion:

- Third Circuit: *Togbah v. Ashcroft*, 104 F. App'x 788, 792 (3d Cir. 2004) (describing alien subject "to **mandatory** detention under 8 U.S.C. § 1225(b)(1)(B)(iii)(IV)"); *Tineo*, 350 F.3d at 387, 398 (explaining that "[b]ecause § [1225](b)(2) **requires** the INS to detain aliens 'not clearly and beyond a doubt entitled to be admitted' and because of the limited grounds for parole in § [1182](d)(5)(A), in practice, these provisions often result in the **mandatory detention** of returning lawful permanent residents at places of inspection" and referring to "*de facto* **mandatory** detention regime in § 235(b)(2) of the IIRIRA") (emphasis added)).
- Fifth Circuit: *Texas*, 20 F.4th at 978, 988, 994 ("Section 1225(b)(2)(A) provides that, under certain circumstances, 'the alien shall be detained' during her removal proceeding. **That's obviously a mandatory statutory command—**

not a commitment to agency discretion."; "Congress ... phrased § 1225(b)(2)(A) in **mandatory terms**."; "§ 1225(b)(2)(A) uses **mandatory language** ('the alien shall be detained') to **require** DHS to detain aliens pending removal proceedings.… The Supreme Court [in *Jennings*] has given this provision the same gloss." (citations omitted) (emphasis added))

- Sixth Circuit: *Hamama v. Adducci*, 946 F.3d 875, 879 (6th Cir. 2020) ("§ 1225(b) ... **mandates detention** of aliens during asylum proceedings"; "§ 1225(b) ... **mandate[s] detention**" (emphasis added))

The Ninth Circuit has also interpreted the parole authority of 1182(d)(5) as being strictly limited: "The scope of § 1182(d)(5)(A) is **carefully circumscribed**: Aliens may be paroled into the United States 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'" *Ortega-Cervantes*, 501 F.3d at 1119 (emphasis added)). In IIRIRA, "Congress ... narrow[ed] the circumstances in which aliens could qualify for 'parole into the United States'" *Id.*

The other circuit courts that have interpreted the meaning of Section 1182(d)(5) have similarly concluded that the Executive's authority to parole is strictly limited:

- Second Circuit: *Cruz-Miguel*, 650 F.3d at 194, 198, 199 and n.15 ("8 U.S.C. § 1182(d)(5)(A) ... confer[s] discretion on the Attorney General to grant ... parole under **limited circumstances**"; "Congress, in IIRIRA, specifically **narrowed** the executive's discretion under § 1182(d)(5)(A) to grant "parole into the United States"; "'parole into the United States' under § 1182(d)(5)(A) is **narrowly circumscribed**"; "legislative history indicates that [IIRIRA's] change [to Section 1182(d)(5)] was animated by concern that parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy")
- Third Circuit: *Delgado-Sobalvarro v. Att'y Gen.*, 625 F.3d 782, 786 (3d Cir. 2010) ("§ [1182] authorizes aliens to be temporarily paroled into the United States **based on strict criteria**"; "[t]he most recent Department of Homeland Security

memorandum on this issue explains that 'parole under section 212(d)(5)(A) is permitted only after a case-by-case assessment' based on specific criteria." (emphasis added)); *Tineo*, 350 F.3d at 387 (explaining that "[b]ecause § [1225](b)(2) requires the INS to detain aliens 'not clearly and beyond a doubt entitled to be admitted' and **because of the limited grounds for parole in § [1182](d)(5)(A)**, in practice, these provisions often result in the mandatory detention of returning lawful permanent residents at places of inspection" (emphasis added))

- Fifth Circuit: *Texas*, 20 F.4th at 997 (the government "cannot use [the parole] power to parole aliens *en masse* ... the Government's proposal to parole every alien it cannot detain is the opposite of the 'case-by-case basis' determinations required by law")

IV. The Parole and Non-Detention Policies Violate the APA

A. The Parole and Non-Detention Policies Are Arbitrary and Capricious

The APA prohibits agency actions that are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Additionally, a rule that fails to include stated reasoning is arbitrary and capricious. *Action on Smoking & Health v. CAB*, 699 F.2d 1209, 1219 (D.C. Cir. 1983). Furthermore, DHS action is arbitrary and capricious if it is issued "without any consideration whatsoever of a [more limited] policy." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)). Defendants implemented the Parole and Non-Detention Policies without providing a reasoned explanation for them and also without considering a more limited policy. And even after this action and a similar action in Florida put Defendants on notice of these deficiencies, the November Memo failed to provide a reasoned explanation or consider alternatives.

Furthermore, Defendants do not deny that have failed to explain their "extreme departure from prior practice," *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 858 (N.D. Cal. 2018), as required by the APA. *Regents*, 140 S. Ct. at 1913. Nor do Defendants deny

that the Parole and Non-Detention Policies impose costs on Arizona and that Defendants ignored those costs when formulating the Policies, even though Defendants were required to consider those costs. *Regents*, 140 S. Ct. at 1913.

Instead, Defendants merely deny that any such policy exists and that the Third Amended Complaint is inappropriately trying to dictate how Defendants exercise their discretion. Whether the Policies exist, however, is a factual question that requires discovery and production of an administrative record. Essentially, Defendants' argument is "Plaintiffs' claims are factually untrue." That is not the sort of argument that can prevail on a motion to dismiss. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975). Plaintiffs have made plausible and reasonable allegations about Defendants' actions that, if true, would constitute arbitrary and capricious agency action.

B. The Parole and Non-Detention Policies Were Adopted in Violation of the APA's Notice-and-Comment Requirements

The APA defines "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" 5 U.S.C. §551(4). Further, the APA requires agencies issuing rules to conduct notice-and-comment rulemaking. 5 U.S.C. §553. The Parole and Non-Detention Policies were major policy changes that required notice-and-comment rulemaking. *See Jean v. Nelson*, 711 F.2d 1455, 1483 (11th Cir. 1983) (holding that a significant new, binding government policy regarding immigration detention is subject to notice and comment). The November Memo announces a drastic expansion of the government's use of its parole authority. The government granted parole to *18,000 migrants* in December 2021 alone under this policy. To the extent this does not violate § 1182(d)(5), the November memo significantly affected rights and obligations and at a minimum required notice and comment. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *Jean*, 711 F.2d at 1482–83.

Defendants claim that the Parole and Non-Detention Policies do not exist and that line

officers are merely continuing to grant parole on a discretionary basis, as they always have, without any alteration of the substantive standard for parole eligibility. (Doc. 146 at 26.) But that claim is belied by the sudden *three-thousand fold* increase in parole grants. No mere "general statement of policy" could pull off such an abrupt and transformational change, and Plaintiffs have at least plausibly alleged it is no such thing.

Defendants are also notably talking out of both sides of their mouths: after denying the existence of the Parole and Non-Detention Policies, in the very next breath Defendants claim that these purportedly non-existent policies are in fact "general statements of policy" not subject to the APA's notice-and-comment requirement. But if no policy actually exists, Defendants should not able to characterize what it is *by definition*. Defendants' ability to analyze the policies and (wrongfully) claim they are "general statements of policy" implicitly--but inescapably--concedes the existence of a policy challengeable by the APA. And Defendants' apparent position that they can somehow describe what does not actually exist is a metaphysical argument rather than a legal one.

CONCLUSION

The border is suffering a crisis that has been caused almost entirely by Defendants' abandonment of their duty to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3. The INA requires mandatory detention for unauthorized aliens (or their return to Mexico), and Defendants do not have the power to create a program for the broad grant of parole to unauthorized aliens. Their Parole and Non-Detention Policies thus violate clear statutory commands.

Defendants' attempts to shield their pervasive legal violations from review fail. Their *de facto* policies are reviewable by this Court, and are not committed to their unrevewiable discretion, and this Court has jurisdiction as Plaintiffs have standing and their claims are not moot. Defendants' motion to dismiss should be denied, or alternatively, this Court should grant leave to Plaintiffs to amend or supplement their complaint.

RESPECTFULLY SUBMITTED this 16th day of February, 2022.

MARK BRNOVICH
ATTORNEY GENERAL

By: /s/ *James K. Rogers*
Joseph A. Kanefield (No. 15838)
Brunn W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
James K. Rogers (No. 27287)

Attorneys for Plaintiffs Mark Brnovich and the State of Arizona

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants who have appeared are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers
Attorney for Plaintiffs Mark Brnovich, in his official capacity as Attorney General of Arizona; and the State of Arizona

Exhibit A

1300 Pennsylvania Avenue, NW
Washington, DC 20229

HQBOR 50/10-C

U.S. Customs and Border Protection

NOV 0 2 2021

MEMORANDUM FOR: All Chief Patrol Agents
All Deputy Chief Patrol Agents

FROM: Raul L. Ortiz
Chief
U.S. Border Patrol

SUBJECT: Parole Plus Alternative to Detention

This memorandum supersedes previous guidance relating to prosecutorial discretion and issuance of Notices to Report (NTR), as issued in March 2021, and establishes conditions for the implementation of parole plus Alternative to Detention (Parole + ATD), a processing pathway that will replace the use of NTR unless that pathway is explicitly authorized by the U.S. Border Patrol (USBP) Chief.

USBP takes very seriously its mission of creating a secure border while ensuring the health and safety of migrants in its custody, as well as the health of the workforce. Earlier this year, when encounters were consistently high, operational capacity strained, and COVID-19 acute, USBP began issuing NTRs, a significantly faster mechanism for processing noncitizens, particularly when used for family units (FMU). NTRs were used for certain noncitizens following initial processing and collection of biometric and biographic information. The use of this processing pathway enabled USBP to relieve overcrowding in congregate settings, thus better protecting both the workforce and noncitizens in our custody. Importantly, use of an NTR decreased processing times significantly compared with processing families for a Notice to Appear (NTA), thus ensuring that families were more expeditiously moved out of U.S. Customs and Border Protection (CBP) custody. The process of issuing NTAs is much more time consuming, given the level of detail and interagency coordination required to establish A-files and finalize the charging documents. Those released with NTRs, however, were directed to report to ICE for further processing, including for an NTA, as appropriate.

Effective immediately, USBP is ceasing the use of NTRs. When noncitizens will be processed for release from USBP facilities, USBP will prioritize resources to issue noncitizens NTAs immediately. NTAs formally initiate immigration proceedings, and it is USBP's goal to maximize NTA issuance from USBP facilities and eliminate the need for use of alternative processing pathways in the future.

In circumstances where an alternate path is necessary to address urgent crowding and excessive Time-In-Custody (TIC) in USBP facilities, Border Patrol has developed an alternative processing pathway: the use of Parole + ATD. This pathway includes enrollment of FMUs in ICE ATD programs to ensure individuals are accounted for after release from USBP facilities. Parole + ATD is a rigorous enforcement process that is effective and includes accountability measures to

require noncitizens to report to ICE for issuance of an NTA and continue through the formal immigration process.

To deal with situations in which capacity constraints or conditions in custody warrant the more expeditious processing, USBP may consider use of Parole + ATD on a case-by-case basis for FMUs when certain conditions, laid out below, exist. The use of Parole + ATD in these circumstances will ensure that the USBP can continue to meet its mission requirements, such as border security operations, by maximizing deployments of agents to the field. Use of Parole + ATD is consistent with 8 U.S.C. § 1182(d)(5), which provides that certain noncitizens may be paroled temporarily "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit"—namely, the urgent humanitarian need to protect the workforce, migrants, and American public against the spread of COVID-19 that may be exacerbated by overcrowding in CBP facilities.

All individual members of a FMU who are processed for Parole + ATD, will, as a condition of their parole, be required to report to ICE within 15 days to be processed for an NTA. Effective immediately:

In the Del Rio (DRT) and Rio Grande Valley (RGV) Sectors, Chief Patrol Agents may authorize the processing of FMUs for Parole + ATD on a case-by-case basis when the temporary staffing support to the sector is maximized, the seven-day average of encounters is greater than the sector's Fiscal Year 2019 May daily average,[1] and when one or more of the following is true:

- The average TIC in the sector exceeds 72 hours AND the number of subjects who were taken into custody in the sector during the preceding 48 hours exceeds the number of individuals booked out in the same period.

- The sector exceeds 100% of the total non-COVID detention capacity AND the number of subjects who were taken into custody in the sector during the preceding 48 hours exceeds the number of individuals booked out in the same period.

Outside of the DRT and RGV Sectors, any sector seeking to utilize the Parole + ATD pathway must obtain approval from the USBP Chief and the CBP Commissioner prior to implementation. The USBP Chief and CBP Commissioner may authorize the use of this pathway in situations in which capacity constraints or conditions in custody show that there is an urgent humanitarian reason to release FMUs in a more expeditious fashion in order to avoid crowding in CBP facilities and the resulting COVID-19 health risks to the workforce and migrants in custody, taking into account the factors identified above.

The use of Parole + ATD pathway in DRT and RGV Sectors will be reassessed by USBP HQ on a daily basis in accordance with the conditions established above.

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[1] The Fiscal Year 2019 May daily average in RGV was 1,607 and in DRT was 276. This month saw the highest encounter numbers that year.

Parole + ATD may not be used for noncitizens who pose a national security or public safety threat. Furthermore, Parole + ATD may only be issued when an individual is not covered by or is excepted from, on a case-by-case basis, the U.S. Centers for Disease Control and Prevention (CDC) Title 42 Order.

In sectors in which the use of the Parole + ATD pathway has been approved, if parole is appropriate based on a consideration of the above factors (as well as any other applicable urgent humanitarian reasons or significant public benefit considerations), USBP agents may exercise their discretion to process the noncitizen(s) with Parole + ATD, after initial enrollment processing is complete, rather than issuing an NTA.

Under no circumstances will a noncitizen who claims to be, is suspected to be, or is determined to be a noncitizen unaccompanied child as defined by 6 U.S.C. § 279(g)(2), be processed through this pathway.

As the processing landscape and the nature of the current COVID-19 pandemic remains fluid and may change over time, updated guidance will be disseminated to the field via email to reflect the latest changes. In particular, when COVID-19 conditions eventually improve, it is expected that there will no longer be a need for this alternate pathway.

Staff may direct their questions to the Immigration, Prosecutions, and Custody Operations Unit at Headquarters by emailing ImmigrationProsecution&CustodyOPS@cbp.dhs.gov.

Exhibit B

Assistant Secretary for Legislative Affairs
U.S. Department of HomelandSecurity
Washington, DC 20528

Homeland Security

January 31, 2022

The Honorable Andy Biggs
U.S. House of Representatives
Washington, DC 20515

Dear Representative Biggs:

Thank you for your May 19, 2021, letter to the Department of Homeland Security (DHS). Secretary Mayorkas asked that I respond on his behalf, and I apologize for the delay in responding.

Noncitizens who are unlawfully present in the United States may be processed for removal from the United States in accordance with U.S. immigration law. U.S. Customs and Border Protection (CBP) is responsible for the inspection and processing of noncitizens who arrive at ports of entry or are encountered between ports of entry. CBP is authorized to apprehend a noncitizen who has entered the United States without inspection between the ports of entry. In certain circumstances, CBP may process a noncitizen for removal pursuant to section 235 of the Immigration and Nationality Act (INA), also known as expedited removal. CBP may also issue a charging document that places the noncitizen in removal proceedings before the Executive Office for Immigration Review within the Department of Justice (DOJ) under section 240 of the INA. Once a noncitizen undergoes processing in CBP custody, CBP typically transfers that noncitizen to U.S. Immigration and Customs Enforcement (ICE) for detention, as appropriate.[1]

ICE prioritizes its limited enforcement resources on noncitizens who are determined to pose a threat to national security, border security, or public safety. Upon arrest by ICE, a noncitizen may be placed in immigration proceedings with the issuance of a charging document. If the noncitizen has previously been ordered removed or has been convicted of an aggravated felony under the INA, he or she may be removed without being placed in removal proceedings under section 240 of the INA. Such noncitizens, however, may pursue protection from removal if they have a fear of returning to their home country.

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[1] CBP may transfer single adults and family units to ICE Enforcement and Removal Operations custody. Unaccompanied noncitizen children are transferred to the care and custody of the Department of Health and Human Services Office of Refugee Resettlement in accordance with the Trafficking Victims Protection Reauthorization Act of 2008 and the Homeland Security Act of 2002.

As part of removal proceedings in immigration court, the immigration judge (IJ) makes a determination of the noncitizen's removability as well as eligibility for relief or protection from removal. If the IJ determines that the noncitizen is subject to removal from the United States and ineligible for relief, the IJ will issue a final order of removal. The noncitizen then has the right to appeal and may exercise that right by filing a notice to appeal with the Board of Immigration Appeals (BIA) within DOJ. If the BIA dismisses the noncitizen's appeal of the IJ decision or otherwise affirms the IJ's order of removal, the order of removal becomes administratively final. The noncitizen may then file a Petition for Review of the final order of removal, along with a stay of removal, with the federal court of appeals having jurisdiction over the matter. If the federal court of appeals grants the stay of removal, DHS will not execute the final order of removal until the court of appeals dismisses the Petition for Review or lifts the stay of removal. Additionally, removal from the United States does not prevent the noncitizen from filing a Motion to Reopen.

Earlier this year, when encounters were consistently high, operational capacity strained, and COVID-19 acute, the U.S. Border Patrol (USBP) began issuing Notices to Report (NTRs), a significantly faster mechanism for processing noncitizens, particularly when used for family units. NTRs were used for certain noncitizens following initial processing and collection of biometric and biographic information. The use of this processing pathway enabled USBP to relieve overcrowding in congregate settings, thus better protecting both the workforce and noncitizens in its custody. Importantly, use of an NTR decreased processing times significantly compared with processing families for a Notice to Appear (NTA), thus ensuring that families were more expeditiously moved out of CBP custody. Those released with NTRs were directed to report to ICE for further processing, including for an NTA, as appropriate.

USBP has since ceased the use of NTRs. When noncitizens are processed for release from USBP facilities, USBP prioritizes resources to issue noncitizens NTAs immediately. NTAs formally initiate immigration proceedings, and it is USBP's goal to maximize NTA issuance from USBP facilities and eliminate the need for use of alternative processing pathways in the future.

To deal with situations in which capacity constraints or conditions in custody warrant more expeditious processing, an alternative pathway has been developed: the use of Parole+ Alternatives to Detention (ATD). Parole+ ATD is a rigorous and effective enforcement process that includes accountability measures to require noncitizens to report to ICE for issuance of an NTA and continue the formal immigration removal process.

From March 21 through December 10, 2021, CBP processed 148,366 individuals with an alternate processing document at the Southwest Border. Of those, 94,039, or 63.38 percent, were processed with an NTR, while 54,327, or 36.62 percent, were processing using Parole+ ATD. All individuals who did not receive an NTA at the border are required to report to an ICE field office to receive an NTA and begin the next step in their immigration proceedings. Of these 148,366 individuals, as of December 10, 2021, 108,069 have complied with or are within the check-in window.

If ICE officers determine that an individual has provided incorrect information or is otherwise not adhering to their terms of release, ICE may take further action, to include enforcement action in cases where it is appropriate, based upon current enforcement priorities and the specific facts and circumstances involving the noncitizen.

Thank you again for your letter; enclosed are responses to the questions posed in your letter. Should you wish to discuss this matter further, please do not hesitate to contact the Office of Legislative Affairs at (202) 447-5890.

Sincerely,

Alice Lugo
Assistant Secretary for Legislative Affairs

Enclosure

The Department of Homeland Security's Response to Representative Andy Biggs' May 19, 2021 Letter

1. **How many aliens who were released from CBP custody without receiving an NTA have reported to ICE?**

   In March 2021, U.S. Border Patrol began issuing Notices to Report (NTRs), a significantly faster mechanism for processing noncitizens, particularly when used for family units. Before this practice was replaced by parole plus Alternatives to Detention, NTRs were used for certain noncitizens following initial processing and collection of biometric and biographic information. The use of this processing pathway enabled U.S. Border Patrol to relieve overcrowding in congregate settings, thus better protecting both the workforce and noncitizens in its custody. Those released with NTRs were directed to report to U.S. Immigration and Customs Enforcement (ICE) for further processing, including for the issuance of a Notice to Appear (NTA), as appropriate.

   From March 21, 2021 through January 10, 2022, U.S. Customs and Border Protection (CBP) released a total of 164,584 noncitizens from custody via prosecutorial discretion. Of this total, 94,036 noncitizens were released with an NTR, and 70,548 were released with Parole Plus Alternatives to Detention (Parole+ATD). Of the 164,584 released noncitizens, 110,176 have checked in at an ICE field office, while 20,055 others were still within their compliance window as of January 10, 2022.

2. **How many of those aliens have received an NTA?**

   Between March 21, 2021 through January 10, 2022, ICE issued 62,099 charging documents to noncitizens who reported to an ICE field office .

3. **You stated that "Individuals who do not appear are a priority of ours for apprehension in the service of border security."**

   To determine whether a noncitizen is a priority for apprehension and removal, an individualized assessment of the case must be made. On September 30, 2021, Secretary Mayorkas issued *Guidelines for the Enforcement of Civil Immigration Law*, which took effect on November 29, 2021. This guidance directs CBP and ICE personnel to focus limited enforcement and removal resources on cases that present threats to national security, public safety, and border security. In determining whether to pursue an enforcement action, ICE officers and agents are required to consider the totality of circumstances, including mitigating and aggravating factors.

4. **How many aliens who have not reported to ICE have been arrested by ICE?**

   When ICE has information on a noncitizen's whereabouts via CBP's Unified Immigration Portal, ICE is able to take appropriate follow-up action in cases where an individual does not comply with an NTR (subject to ICE Enforcement and Removal Operations [ERO] resources and the Department's enforcement priorities and resources).

Noncitizens who fail to report to an ICE field office receive a charging document via the mail to initiate removal proceedings. Failure to appear for an immigration court hearing may result in an *in absentia* removal order and, depending on the circumstances of the case, render an individual a priority for apprehension and removal. In addition, individuals placed on an ATD program who did not comply with instructions to report to an ICE field office may be placed on a higher level of supervision or be required to check in with ICE more frequently. Each case is handled individually, and compliance with reporting dates is only one factor ICE ERO officers review when determining what level of supervision is appropriate for a case.

5. **How many of those aliens have been removed from the country?**

   At this time, ICE ERO is unable to statistically track the number of noncitizens released by CBP with a charging document or instructions to check-in with ICE who have been removed from the United States.

6. **Will you commit to using every resource and legal authority available to you to remove all the aliens who do not report to ICE as quickly as possible?**

   ICE is committed to enforcing immigration laws humanely, effectively, and in accordance with the prioritization of those individuals who pose a threat to national security, public safety, and border security.