UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS; STATE OF LOUISIANA, *Plaintiffs*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants*.	Case No. 6:21-cv-16

PLAINTIFFS' POST-TRIAL BRIEF

I. The challenged action determines rights or obligations or produces legal consequences.

To be reviewable final agency action, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997). "The Supreme Court has long taken a pragmatic approach to finality, viewing the APA's finality requirement as 'flexible.'" *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (cleaned up).

The challenged agency action here determines rights or obligations and produces legal consequences in several ways.

A. The agency action explained by the September 30 Memorandum binds DHS staff.

"[L]egal consequences flow from" an agency action that "binds its staff." *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019). And "where agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action." *Texas v. Biden* ("*Texas MPP*"), 20 F.4th 928, 948 (5th Cir. 2021) (quoting *EEOC*, 933 F.3d at 442).

"Courts have looked for mandatory language to determine whether an agency's action binds it and accordingly gives rise to legal consequences. In some cases, the mandatory language of a document alone can be sufficient to render it binding." *EEOC*, 933 F.3d at 441–42 (cleaned up); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 864 (8th Cir. 2013) ("[T]he language used to express 'the EPA's position'—'should not be permitted'—is the type of language we have viewed as binding because it 'speaks in mandatory terms.'").

The challenged memorandum mandates that DHS staff use a multi-factor analysis of mitigating and aggravating factors when placing or rescinding detainers:

- "Whether a noncitizen poses a current threat to public safety *is not to be determined* according to bright lines or categories, [but] an assessment of the individual and the totality of the facts and circumstances." Ex. X at 3 (emphasis added).

- "Our personnel *must* evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." Ex. X. at 4 (emphasis added).

- "Our *personnel should not* rely on the fact of conviction or the result of a database search alone. Rather, our *personnel should*, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue." Ex. X at 4 (emphases added).

- It indicates that the "guidance is Department-wide[;] agency leaders as to whom this guidance is relevant to their operations *will implement* this guidance accordingly." Ex. X at 7 (emphasis added).

The administrative record also demonstrates the memorandum is binding:

> "[T]he new guidelines will *require the workforce* to engage in an assessment of each individual case and make a case-by-case assessment as to whether the individual poses a public safety threat, guided by a consideration of aggravating and mitigating factors."

Considerations Memo, AR0019 (emphasis added).

Defendants' training presentation for ICE staff also shows the binding nature of the memorandum:

- "Assessing the individual and considering the totality of the circumstances *requires* investigation, analysis, and the weighing of aggravating and mitigating factors." Ex. Y at 26 (emphasis added).

- "[E]very case *must* be addressed individually based on the totality of its specific facts and circumstances." Ex. Y at 43 (emphasis added).

ICE now requires its staff to submit data for enforcement actions to their "field office's Assistant Field Office Director (AFOD) or the Assistant Special Agent in Charge (ASAC) for review and confirmation." Ex. CC, AART Quick Reference Guide at 3; Tr. 86–87 (Homan test.). These enforcement actions subject to this review include detainers. Ex. CC at 4. When selecting the "Public Safety" priority category at issue in this litigation, staff are instructed that they "*need* to select all aggravating factors that apply," Ex. CC at 8, and all mitigating factors. *Id*. at 11 (emphasis added). They need to certify that they considered all the factors. *Id*. The AFOD or ASAC will review the submissions to verify that "all *necessary* information has been provided." Ex. CC at 12 (emphasis added).

"[A] guidance document requiring agency staff to use a multi-factor analysis in deciding whether a regulated entity's activity complied with governing law [is] a final agency action." *EEOC*, 933 F.3d at 443 (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)). Such a multi-factor analysis, required of DHS staff, is the heart of the agency action challenged here.

The challenged agency action is also binding because it forbids consideration of the fact of conviction or the result of a database search alone. Ex. X at 4. In the absence of the challenged memorandum, Defendants' staff could make enforcement decisions based solely on criminal conviction, as required by Congress. This "limits

[staff] discretion respecting the use of certain evidence." *EEOC*, 933 F.3d at 443. The memorandum "stripp[ed] preexisting discretion from DHS's own staff" and is final agency action. *Texas MPP*, 20 F. 4th at 951.

B. **The agency action explained by the September 30 Memorandum is a substantive rule.**

The challenged memorandum is also final agency action because it is a substantive rule that alters Defendants' legal obligations to detain aliens under Sections 1226(c) and 1231(a)(2), as this Court determined when granting a preliminary injunction against earlier versions of this policy. *See* ECF 79 at *59–61.

The challenged agency action did not merely "remind parties of existing statutory or regulatory duties" but rather imposed new duties, "chang[ed] the text" of the statute it "profess[ed] to interpret," and effects[ed] a substantive change in existing law or policy," and is therefore a substantive (or "legislative") rule. *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 407 (D.C. Cir. 2020).

"[P]lac[ing] a cost on the states" by "remov[ing] a categorical bar to illegal aliens who are receiving state and federal benefits" is also a sign that the challenged agency action is a substantive rule. *Texas v. United States* (*"Texas DAPA"*), 809 F.3d 134, 173 n.137 (5th Cir. 2015); *see also Texas v. United States*, 328 F. Supp. 3d 662, 731 (S.D. Tex. 2018) (finding DACA was a substantive rule because it "requires states to spend money on various social services") (Hanen, J.); *Texas v. United States*, 549 F. Supp. 3d 572, 600 (S.D. Tex. 2021) (Hanen, J.) ("the DACA Memorandum imposes obligations on private actors, individual states, and on the federal government. As previously discussed in the section on standing, DACA defers action against its recipients, which in turn gives them lawful presence, which then in turn obligates the states to spend money in various areas, including social services, education, and healthcare.").

Aliens released from custody are entitled to Emergency Medicaid, imposing costs on the States that they would not face if Defendants detained the criminal aliens as

required by Congress. *Texas MPP*, 20 F.4th at 969 (citing 42 C.F.R. § 440.255(c)). "If the total number of in-State aliens increases, the States will spend more on healthcare." *Id.* (cleaned up).

An agency action that does not "genuinely leaves the agency and its decisionmakers free to exercise discretion" is also a sign of a substantive rule. *Texas*, 549 F. Supp. 3d at 600 (citation omitted). "[T]the existence of some amount of discretion is not determinative. That premise is especially appropriate here, where whatever discretion exists must fit within the dictates of the [September 30] Memorandum." *Texas*, 549 F. Supp. 3d at 602; *see also id.* at 600 ("The DACA Memorandum itself also includes mandatory language that contradicts its purported conferral of discretion. It instructs agents as to what criteria to consider when determining whether to grant DACA status, and it is compulsory for the agents to use only those prescribed criteria. The Memorandum grants no discretion to the officers to vary from the imposed criteria in any way.") (finding DACA to be a substantive rule).

"An agency pronouncement will be considered binding as a practical matter [—and therefore substantive—] if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Texas DAPA*, 809 F.3d at 171 (citation omitted). As discussed above, the DHS documents, including the September 30 Memorandum explaining the agency action itself, indicate on their face that agency staff are bound to a particular analytical method and have no discretion to depart from it. The evidence of how DHS has applied this guidance also indicates that it is binding, and thus a substantive rule.

As all substantive rules are "by definition, final agency action," *EEOC*, 933 F.3d at 441, the agency action explained by the September 30 Memorandum is therefore final agency action.

C. The agency action explained by the September 30 Memorandum alters the rights of criminal aliens.

The challenged agency action is also final agency action because it alters the rights of aliens who are presently detained. The rights of aliens with final orders of removal are affected because it is more likely to be determined that there is no significant likelihood of removal in the foreseeable future, and therefore further detention not allowed. ECF 79 at 60–61 (citing *Hussein, S.M. v. Garland*, No. 21-cv-348, 2021 WL 1986125, *2–3 (D. Minn. May 18, 2021)).

II. *Castle Rock* has no bearing on this case, and "shall" in the pertinent statutes means "must."

For several reasons, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), has no bearing on the federal agency action challenged in this case. *Castle Rock* involved a Colorado law providing that a "peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest" of a person violating a protective order. *Id.* at 759 (citing Colo. Rev. Stat. § 18-6-803.5(3)). The question considered in that case was "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated." *Id.* at 750–51.

The equivalent of *Castle Rock* applicable to federal agency actions is *Heckler v. Chaney*, 470 U.S. 821 (1985), which held that "an agency's decision not to institute enforcement proceedings [is] presumptively unreviewable." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citing *Heckler*, 470 U.S. at 831). "In other words, a litigant may not waltz into court, point his finger, and demand an agency investigate (or sue, or otherwise enforce against) 'that person over there.'" *Texas MPP*, 20 F.4th at 982. "Thus, *Heckler* recognized and carried forward the executive's longstanding, common-law-based discretion to do nothing in a particular case." *Id.*

Castle Rock involved a request that the courts review the nonenforcement of a law against a particular individual. 545 U.S. at 750–51. The challenged policy here, however, is not a refusal to enforce the detention mandates of Section 1226 or Section 1231 against a particular criminal alien. Rather, it is a challenge to a generally applicable policy as a whole—in the terminology of the Administrative Procedure Act applicable to federal agency actions, the challenged agency action here is a "rule" rather than an "order." *Texas MPP*, 20 F. 4th at 982–83.

Just as "*Heckler* nonreviewability applies only to *orders* and not *rules*," *id.* at 983 (emphases in original), *Castle Rock*, as a challenge to nonenforcement against a particular person, does not set forth anything that could affect this case. While "the common law left the executive free to leave the law unenforced in *particular* instances and at *particular moments* in time, the Constitution explicitly forbade the executive from nullifying whole statutes by refusing to enforce them on a *generalized* and *prospective* basis." *Texas MPP*, 20 F.4th at 983 (cleaned up; emphases in original). "*Heckler*"—like *Castle Rock*—applies "to one-off agency enforcement decisions rather than to agency rulemakings." *Id.*at 984.

Even under *Heckler*, "the presumption [of the unreviewability of nonenforcement discretion] may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 832–33. "Moreover, the Court emphasized that nothing in the *Heckler* opinion should be construed to let an agency 'consciously and expressly adopt a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.'" *Texas MPP*, 20 F.4th at 982 (quoting *Heckler*, 470 U.S. at 833 n.4). "In other words, the executive *cannot* look at a statute, recognize that the statute is telling it to enforce the law in a particular way or against a particular entity, and tell Congress to pound sand." *Texas MPP*, 20 F.4th at 982 (emphasis in original).

Enter *Demore v. Kim*, 538 U.S. 510 (2003). Because "an agency literally has no power to act . . . unless and until Congress confers power upon it," *Louisiana Pub. Serv. Commn. v. FCC*, 476 U.S. 355, 374 (1986), *Demore* emphasized Congress's "broad power over naturalization and immigration," 538 U.S. at 521, and explained the failures of federal immigration agencies to detain criminal aliens. *Id.* at 517–21. This led to Congress "limit[ing] [their] discretion over custody determinations," culminating in "8 U.S.C. § 1226, *requiring* the [agency] to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521 (emphasis added). This subservient relationship of the agency to Congress is one key factor that did not apply in *Castle Rock*, and undercuts any attempt to transpose that case's focus on "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands," 545 U.S. at 761, into the challenge to federal agency action here.

The Supreme Court has repeatedly described Section 1226(c) and Section 1231(a)(2) as mandatory. "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings*, 138 S. Ct. at 837 (emphasis in original). Because "Congress has decided" that the Section 1226(a) "procedure is too risky in some instances" it "adopted a special rule for aliens who have committed certain dangerous crimes and those with connections to terrorism." *Preap*, 139 S. Ct. at 959. These criminal aliens "must be arrested 'when [they are] released' from custody on criminal charges." *Id.*; *see also id.* at 960 ("Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole."). Section 1226(c)(1) provides that the Secretary [of DHS] *must* take into custody any alien falling into one of these categories [of inadmissible or deportable aliens on specified grounds] 'into custody' 'when the alien is released' from criminal custody." *Id.* at 960 (emphasis added). And as the Supreme Court has further explained, Congress adopted these special

procedures because of the serious harms that criminal aliens may cause if not detained, including their high rates of recidivism. *Demore*, 538 U.S. at 518–20.

The same is true for Section 1231(a)(2). Just last term, the Supreme Court confirmed "[d]uring the removal period, detention is mandatory." *Guzman Chavez*, 141 S. Ct. at 2281.

The Fifth Circuit recently explained the limits of *Castle Rock* in the immigration context. It first noted that the same argument that Defendants make here was "as dangerous as it is limitless." *Texas MPP*, 20 F.4th at 997. "*Castle Rock* is relevant only where an official makes a nonenforcement decision." *Id.* at 997–98. "[A]n agency action 'need not directly confer public benefits' to be 'more than nonenforcement.'" *Id.* at 987 (quoting *Texas*, 809 F.3d at 166–67). Instead, "removing a categorical bar on receipt of [governmental] benefits and thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" *Id.* (quoting *Texas*, 809 F.3d at 166–67, which in turn quotes *Heckler*, 470 U.S. at 832).

Just as in *Texas MPP*, DHS's failure to follow Congress's statutory commands here is not "mere nonenforcement" because it makes illegal aliens in Texas newly eligible for Emergency Medicaid, due to their not being in federal custody. *See Texas DAPA*, 20 F. 4th at 969 ("Texas subsidizes healthcare for immigrants, regardless of immigration status. Federal law affirmatively *requires* the States to make some of those expenditures.") (citing 42 C.F.R. § 440.255(c) (Emergency Medicaid)) (cleaned up); *id.* ("The Government appears to concede the obvious—that *if* the total number of in-State aliens increases, the States will spend more on healthcare.") (emphasis in original).

Even if *Castle Rock* applied as a general matter, it would not preclude review of the agency action in this case. First, *Castle Rock* did explain that "a true mandate . . . would require some stronger indication from the Colorado Legislature than" the use of the mandatory "shall." *Id.* at 761. With Section 1226, Congress created a

reticulated scheme of both discretionary and mandatory detention. If Section 1226(c) does not create a mandatory duty in the context of that scheme—by requiring Defendants "shall detain" criminal aliens when released from criminal custody while separately allowing that other aliens may be detained—it is difficult to imagine how Congress could create a mandatory detention scheme at all.

Second, *Castle Rock* repeatedly refers to the problem of arrest in "cases in which the offender is not present to be arrested." *Id.* at 762; *see also id.* ("[I]t is unclear how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested."). But Congress specifically avoided that problem here, by mandating criminal aliens be detained "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1)(D). And the record in this case demonstrates that Defendants have refused to detain aliens subject to Section 1226(c) who are in the States' custody.

Both Section 1226(c) and 1231(a)(2) create mandatory requirements to detain the aliens they cover. "The first sign that the statute impose[s] an obligation is its mandatory language: 'shall.'" *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). "'Unlike the word "may," which implies discretion, the word "shall" usually connotes a requirement.'" *Id.* (quoting *Kingdomware Techs,. Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)). Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c). And Section 1231(a)(2) provides that "the Attorney General shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2).

The "mandatory nature" of Sections 1226(c) and 1231(a)(2) are "underscore[d] by "adjacent provisions." *Maine Cmty. Health Options*, 140 S. Ct. at 1320. "'When', as is the case here, Congress 'distinguishes between "may" and "shall," it is generally clear that 'shall' imposes a mandatory duty.'" *Id.* (quoting *Kingdomware*, 136 S. Ct. at 1977); *see also Hawkins v. HUD*, 16 F.4th 147, 156 (5th Cir. 2021) (holding that clear

regulatory text, which featured a mandatory/permissive distinction, provided the relevant guidelines and thereby overrode *Heckler*).[1] The INA generally—and Sections 1226 and 1231 specifically—use both "may" and "shall," demonstrating that Congress distinguished between duties that the executive must undertake and duties that the executive has discretion whether to undertake. Congress required the executive to detain the aliens covered by Sections 1226(c) and 1231(a)(2) by using the mandatory "shall."

The structure of Section 1226 aptly illustrates this principle. Section 1226(a) provides discretion, stating that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The Attorney General "may" either "continue to detain the arrested alien" or "may release the alien" on "bond" or "conditional parole." *Id*. § 1226(a)(1)-(2). In turn, Section 1226(b) provides that "at any time" that "bond or parole" "may" be "revoke[d]." *Id*. § 1226(b).

Section 1226(c) limits that discretion for some aliens by providing that "[t]he Attorney General shall take into custody" criminal aliens "when the alien is released." *Id*. § 1226(c)(1). The "Attorney General may release" these criminal aliens only under narrowly proscribed circumstances, and upon a determination that "the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Id*. § 1226(c)(2).

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[1] Defendants argued at trial that the statute at issue in *Castle Rock* also involved a contrasting "may." Tr. 2-78–79. While it is true that the dissent raised this argument, the provisions of the statute it cited did not involve a contrasting "shall/may" regarding the same governmental actions. *See Castle Rock*, 545 U.S. at 775 (citing permissive "may" provisions relating to protecting and transporting the victims of domestic violence, not arresting the perpetrator) (Stevens, J., dissenting). The statutes here contain the "shall/may" distinctions regarding the same type of action (detaining or releasing aliens).

Were Section 1226(c) discretionary rather than mandatory, it would be a provision that simply has no function. Section 1226(a) already provides discretion to detain aliens—and so a separate discretionary power to detain criminal aliens would be superfluous. Moreover, were Section 1226(c)(1) discretionary, there would be no need for Section 1226(c)(2) to narrowly proscribe the circumstances where criminal aliens may be released from custody; under this erroneous reading, there is no requirement that they be detained in the first instance, and so no need to circumscribe release.

Interpreting statutes, however, requires avoiding such superfluity. *United States v. Lauderdale Cty., Miss.*, 914 F.3d 960, 966 (5th Cir. 2019)). Reading Sections 1226(c) and 1231(a)(2) to require detention avoids the problems a contrary reading creates.

Again, the Fifth Circuit has addressed this very point for another mandatory detention provision in the INA:

> [8 U.S.C.] § 1225(b)(2)(A) uses mandatory language ("the alien shall be detained") to require DHS to detain aliens pending removal proceedings. The Supreme Court has given this provision the same gloss. *See Jennings*, 138 S. Ct. at 837 ("Read most naturally, §§ 1225(b)(1) and (b)(2) . . . mandate detention of applicants for admission until certain proceedings have concluded.").
>
> Section 1225(b)(2)(C) then explains a permissible alternative to otherwise-mandatory detention. As for most aliens who fit within (A)'s scope, (C) provides that DHS "may" return them to a contiguous foreign territory instead of detaining them. This allowance is, of course, discretionary. But it does not undo the obvious fact that (A) is otherwise mandatory. So (A) sets a default (mandatory detention), and (C) explicitly sets out an allowed alternative (contiguous-territory return pending removal proceedings).

Texas MPP, 20 F.4th at 994–95.

The Court then upheld vacatur of a rule and a permanent injunction against DHS's action that decreased its ability to comply with this mandatory detention requirement:

> As the district court found, DHS lacks the resources to detain every alien seeking admission to the United States. . . . That means DHS can't detain everyone § 1225(b)(2)(A) says it "shall" detain. So it's left with a class of people: aliens it apprehended at the border but whom it lacks the capacity to detain. By terminating MPP, DHS has refused to return that class to contiguous territories, as permitted by § 1225(b)(2)(C). The Government's position thus boils down to this: We can't do one thing Congress commanded (detain under § 1225(b)(2)(A)), and we don't want to do one thing Congress allowed (return under § 1225(b)(2)(C)).

Texas MPP, 20 F.4th at 996; *see also id.* (describing this provision as setting forth "a general, plainly obligatory rule: detention for aliens seeking admission."); *id.* at 988 ("Congress [overcame the *Heckler* presumption] when it phrased § 1225(b)(2)(A) in mandatory terms"); *id.* at 978 ("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.").

Similarly, Congress here has used the same mandatory language regarding detention of aliens, and the challenged agency action reduces DHS's ability to comply with these mandatory detention requirements. It is therefore unlawful and subject to judicial relief under the APA.

III. "Custody" and "detention" are used interchangeably in 8 U.S.C. §§ 1226 and 1231.

The terms "custody" and "detention" are used interchangeably in the immigration statutes and the court rulings interpreting them. There is no daylight between what

the mandatory detention provisions of 8 U.S.C. § 1226(c)[2] and 8 U.S.C. § 1231(a)(2)[3] require. On first look, Section 1226(c)(1) is under the subheading "Custody," which is itself under the heading "Detention," with Section 1226(c)(2) adding "Release" under that heading. Thus, "tak[ing] into custody" and "release from custody" are the two temporal bookends for "custody"—and every part of this process is "detention."

Defendants attempt to concede that they are required by Section 1226(c)(2) to continue detaining aliens who fall into the categories created by Section 1226(c)(1) but deny that they must take them into custody into the first place. But "it would be very strange for Congress to forbid the release of aliens who need not be arrested in the first place." *Preap*, 139 S. Ct. at 970.

In *Reno v. Flores*, 507 U.S. 292 (1993), the Court described as a "*detention* program," *id.* at 312, a policy made pursuant to "the Attorney General's discretion to continue *custody* over arrested aliens under 8 U.S.C. § 1252(a)(1)," *id.* at 309 & 312 n.8 (emphases added); s*ee also id.* at 308 (using term "detention in ICE custody"); *id.* at 322 (equating "custody" with "detention in an institution") (Stevens, J., dissenting).

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[2] (1) Custody: The Attorney General shall take into custody any alien who [is inadmissible or deportable due to certain criminal convictions] . . .when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense. . . .

(2) Release: The Attorney General may release an alien described in paragraph (1) only if [necessary to protect a witness or related persons in a criminal investigation].

[3] "During the removal period, the Attorney General shall detain the alien [with a final order of removal]. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title." For aliens in criminal custody with final orders of removal, the removal period begins on "the date the alien is released from detention or confinement." 8 U.S.C. § 1231(a)(1)(B).

In *Demore*, the Court also discussed *Flores*, equating "holding [aliens] in custody" with "detention." 538 U.S. at 526.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court described 8 U.S.C. § 1231(a)(2)—which provides that "[d]uring the removal period, the Attorney General shall *detain* the alien" (emphasis added)—as requiring that during that period "aliens must be held in *custody*." *Zadvydas*, 533 U.S. at 683 (emphasis added). The Court in *Zadvydas* also referenced 8 U.S.C. § 1537(b)(2)(C), describing its provision that "the Attorney General may . . . retain the alien in *custody*" as a "*detention* determination." *Zadvydas*, 533 U.S. at 697 (emphases added).

In *Sylvain v. Attorney General*, the Third Circuit described Section 1226(c)(1)'s statement that "[t]he Attorney General shall take into custody any alien" convicted of certain crimes" as part of "[t]he scheme . . . known as mandatory detention." 714 F.3d 150, 152 (3d Cir. 2013). *Sylvain* also describes Section 1226(c)(1) as "requir[ing] officials to detain aliens who have committed one of the crimes listed in subparagraphs (A) through (D)," *id.* at 154, and paraphrases Section 1226(c)(1)'s requirement that officials "shall take into custody any alien" convicted of the listed crimes "when the alien is released" as mandating that "the government must detain the alien 'when . . . released.'" *Id.* at 159.

In *Jennings v. Rodriguez*, the Court examined Section 1226(c)—which makes reference to "custody" and release from it but does not use the term "detention" or "detain," other than in its heading—and states that that provision "does not on its face limit the length of the *detention* it authorizes." 138 S. Ct. 830, 846 (2018) (emphasis added). It then reviewed dictionary definitions of "detain," which are synonymous with "custody":

> *see, e.g.*, Webster's Third New International Dictionary 616 (1961) ("to hold or keep in or as if in custody by the police for questioning"); Webster's New International Dictionary 710 (2d

> ed. 1934) ("[t]o hold or keep as in custody"); American Heritage Dictionary 508 (def.2) (3d ed. 1992) ("To keep in custody or temporary confinement"); Webster's New World College Dictionary 375 (3d ed. 1997) ("to keep in custody; confine"). And legal dictionaries define "detain" the same way. *See, e.g.*, Ballentine's Law Dictionary 343 (3d ed. 1969) ("To hold; to keep in custody; to keep"); Black's Law Dictionary 459 (7th ed. 1999) ("The act or fact of holding a person in custody; confinement or compulsory delay").

138 S. Ct. at 848. The Court then discussed the use of these terms in the *Zadvydas* opinion as synonymous:

> The term that the *Zadvydas* Court found to be ambiguous was "may," not "detain." *See* 533 U.S., at 697. And the opinion in that case consistently used the words "detain" and "custody" to refer exclusively to physical confinement and restraint. *See id.,* at 690, (referring to "[f]reedom from imprisonment—from government custody, *detention, or other forms of physical restraint*" (emphasis added)); *id*. at 683 (contrasting aliens "released on bond" with those "held in custody").

138 S. Ct. at 850.

The dissent in *Jennings* also agreed that "there is no reason to interpret 'custody' differently than 'detain,'" noting that "[t]he [Oxford English Dictionary] defines 'custody' as '[t]he state of being detained.'" *Id.* at 873 (Breyer, J., dissenting).

In *Preap*, the Court described Section 1226(c)—relating to "custody" and "release" from it—as concerning "mandatory detention." 139 S. Ct. at 966, 968. Justice Kavanaugh also described Section 1226(c)(1)—which uses the term "custody" and does not mention "detention" or "detain"—as a place where "Congress has mandated detention 'when' such noncitizens are "released" from criminal custody." *Id.* at 973 (Kavanaugh, J. concurring) (quoting 8 U.S.C. § 1226(c)(1)); *see also id.* (referring to "the Executive Branch's mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody). The dissent also connects the acts of

taking into custody and holding in detention: Section 1226(c) "requires the Secretary of Homeland Security to take those aliens into custody 'when . . . released' from prison and to hold them. . . ." *Id*. at 976 (Breyer, J., dissenting).

In sum, "custody" is the same as "detention." Detention may only begin when the alien is "take[n] into custody" in the first place, and detention ends when the alien is "release[d]" from that custody.

IV. The challenged guidance is contrary to law under the APA because "shall" in 8 U.S.C. §§ 1226 and 1231 is mandatory.

If Congress has mandated that DHS "take into custody" and "detain" certain criminal aliens (and has provided only one exception: for witnesses and related persons in criminal investigations), then adopting a rule that dispenses with that requirement—indeed, that forbids agents of DHS from following those categorical commands—means that "the Government has assumed a discretionary power that Congress has explicitly foreclosed," as this Court previously ruled. *Texas*, 2021 WL 3683913, *36. "The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to wok in practice." *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014). An agency lacks the authority "to develop new guidelines . . . in a manner inconsistent with" an "unambiguous statute," *Barnhart v. Sigmon Coal Co*., 534 U.S. 438. 462 (2002), and "an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

Indeed, this power of Congress applies in the immigration context because:

> [i]t is undisputed that Congress may mandate that the Executive Branch detain certain noncitizens during removal proceedings or before removal. Congress has in fact mandated detention of certain noncitizens who have been in criminal custody and who, upon their release, would pose a danger to the community or risk of flight. As relevant here, Congress has mandated detention

> "when" such noncitizens are "released" from criminal custody. 8 U.S.C. § 1226(c)(1).

Preap, 139 S. Ct. at 973 (Kavanaugh, J., concurring). "[W]hat § 1226(c) does is select a class of people for confinement on a categorical basis and deny members of that class any chance to dispute the necessity of putting them away." *Demore*, 538 U.S. at 551–52 (Souter, J., concurring in part and dissenting in part) (cleaned up). By preventing agency staff from following that categorical command, DHS is flouting the laws enacted by Congress.

V. The challenged agency action is arbitrary and capricious even if the "Considerations Memo" is evaluated as part of the decision.

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). As explained in the briefing for the Motion to Postpone, the explanation accompanying the agency action itself must provide the reasons for the action—any reasons in the administrative record are not evidence that they were the basis for the agency action. ECF No. 128 at 12–14.

"An agency must defend its actions based on the reasons it gave *when it acted*." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (emphasis added). The September 30 Memorandum does not reference any of the explanations given in the Considerations Memo, AR 0001. Items in the administrative record are data that the reasoned explanation may rely on, but are not themselves able to constitute the reasoned basis for the action. While a challenged agency action with a "skeletal" explanation may be supplemented by reasons given in "accompanying explanatory correspondence" from the agency, *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004), the agency action challenged here doesn't even have a "skeletal" reference to the factors elaborated in the Considerations Memo—it fails to mention any of those factors that this Court previously found the absence of in the prior

memoranda to be arbitrary and capricious. Indeed, it doesn't even reference the Considerations Memo at all. While a "skeletal" explanation of "less than ideal clarity" may allow an action to be upheld "if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.,* 419 U.S. 281, 286 (1974), a "ghostly" one cannot constitute reasoned decisionmaking.

However, even if the Considerations Memo were evaluated to determine the rationality of the agency action here, the agency action is still arbitrary and capricious.

A. The Considerations Memo articulates factors Congress did not intend the agency to consider.

First, the Considerations Memo relies on illegitimate factors. It refers to the "supposed" risks of recidivism of all criminal aliens, and lauds the agency action as giving DHS the ability to weigh the risks of recidivism of particular criminal aliens by examining aggravating factors. AR0012. But this is an attempt to grant the agency discretion that Congress explicitly removed from it.

"Congress adopted [Section 1226] against a backdrop of wholesale failure by the [agency] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518. Congress enacted Section 1226 because the agency "at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society," but "Congress' concern [was] that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight," and "deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Id*. at 518–21. "It was following those Reports that Congress enacted 8 U.S.C. § 1226, requiring the [agency] to detain a subset of deportable criminal aliens pending a determination of their removability." *Id*. at 521. Section 1226(c)'s "job [was] to

subtract some of [the agency's] discretion when it comes to the arrest and release of criminal aliens." *Preap*, 139 S. Ct. at 966 (emphasis in original).

The Considerations Memo does the same regarding the employment of illegal aliens. Congress has enacted a "comprehensive framework for combating the employment of illegal aliens" and "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Arizona v. United States*, 567 U.S. 387, 404 (2012) (cleaned up). In the DACA litigation, Judge Hanen has twice examined the laws prohibiting the employment of illegal aliens and specific statutory exceptions to that general feature of immigration law. *See Texas*, 328 F.Supp.3d at 716–18; *Texas*, 549 F.Supp.3d at 610–12. And "as Congress [has] explained, '[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others.'" *Demore*, 538 U.S. at 518 (quoting S.Rep. No. 104–249, p. 7 (1996)).

The articulated reasons for the agency action here undermine Congress's framework. In the September 30 Memorandum itself, the policy that "[t]he fact an individual is a removable noncitizen . . . should not alone be the basis of an enforcement action against them" is justified because "they have been contributing members of our communities for years," including "individuals who work on the frontlines in the battle against COVID, lead our congregations of faith, teach our children, [and] do back-breaking work to help deliver food to our table." Ex. X at 2.

The Considerations Memo builds on this: "the grandmothers, clergy, teachers, and farmworkers who have lived and worked in the United States, contributing to the country without causing harm, should not be a priority based solely on the fact that they are removable." AR0019. Contrast this with Congress's determination that illegal aliens working in the country *do* cause harm. *See INS v. Natl. Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 (1991) ("a primary purpose in restricting immigration is to preserve jobs for American workers").

"[B]ecause agency action must be based on non-arbitrary, relevant factors, the agency's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (cleaned up). The rationale for agency action reflected in the September 30 Memorandum and the Considerations Memo contradicts those purposes.

The Considerations Memo thus rationalized the agency action reflected in the September 30 Memorandum on bases explicitly rejected by Congress's statutory commands. But an agency rule is "arbitrary and capricious if it the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Assn. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The challenged action here fails that test of rational decisionmaking.

B. The Considerations Memo does not mention the agency's ability to reprogram and transfer funds to increase detention capacity.

Second, "when an agency rescinds a prior policy, its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Texas MPP*, 20 F.4th at 992 (cleaned up) (quoting *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913).

Under the heading "Resource Considerations," the Considerations Memo challenges this Court's supposed "misconception that if the [agency] did not prioritize its enforcement efforts—or if it prioritized enforcement in some different way—a significantly greater number of people could be arrested, detained, moved through removal proceedings, and processed for removal." AR0017. The Considerations Memo asserts that this "is false" because of "[r]esource limitations [that] make that an impossibility, as has been the case since [DHS] was formed (and before that as well). *Id.*

But DHS's rationale that it simply doesn't have the capacity to detain more criminal aliens fails to consider a tool that it has used repeatedly to boost capacity.

Consistent with its history, DHS is currently authorized to reprogram and transfer funds to ICE "to ensure the detention of aliens prioritized for removal." Consolidated Appropriations Act of 2021, Pub. L. No. 116-120, 134 Stat. 1182, 1457 (2020). Congress reauthorized this provision with a continuing resolution for FY2022. *See* The Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. No. 117-43, 135 Stat. 344-45 (2021).

DHS has repeatedly used such appropriations provisions to increase detention capacity. *See* Tr. 88–93, 199–205 (testimony of Thomas Homan). The failure to even mention such an "alternative within the ambit" of the challenged policy relating to detention of criminal aliens also "fails to account for relevant factors." *Texas MPP*, 20 F.4th at 989 (quotation omitted). It is therefore arbitrary and capricious.

VI. The States are entitled to an injunction, a declaration, and vacature.

Having proved their case, the States are entitled to have their injuries remedied. Several remedies are appropriate. First, the States are entitled to an injunction against the Defendants' implementation or use of the standards announced in Sections II and IV of the September 30 Memorandum. Second, they are entitled to an injunction requiring the Defendants to comply with the terms of Section 1226(c) and Section 1231(a)(2). Third, they are entitled to a declaration of the parties' rights and obligations as to each other. And, finally, they are entitled to have the September 30 Memorandum vacated.

A. The States are entitled to an injunction against enforcement of the September 30 Memorandum.

The APA's default remedy is vacatur of the challenged rule and remand to the promulgating agency for further proceedings. 5 U.S.C. § 706(2) (requiring court to "hold unlawful and set aside agency action, findings, and conclusions found to be" noncompliant with the APA); *see also United Steel v. Mine Safety & Health Admin*,

925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."). However, prevailing plaintiffs are also entitled to the remedies afforded by the particular type of claim they bring, "including actions for declaratory judgments or writs of prohibitory or mandatory injunction[.]" 5 U.S.C. § 703. Here, the States have sought an injunction prohibiting the Defendants from implementing Sections II and IV of the September 30 Memorandum and requiring them to comply with Section 1226(c) and 1231(a)(2). They have satisfied each requirement for obtaining such an injunction, *see Calmes v. United States*, 926 F. Supp. 582, 591 (N.D. Tex. 1996), and the Court should issue it.

1. Success on the merits

As described above, the States succeeded on the merits of their claims.

2. Irreparable injury

For an injury to be sufficiently "irreparable," the States need only show the injury "cannot be undone through monetary remedies." *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (quoting *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)); *Humana, Inc. v. Avram A. Jacobson, M.D., P.*A., 804 F.2d 1390, 1394 (5th Cir. 1986). Texas and Louisiana "bear[] many of the consequences of unlawful immigration" and will suffer irreparable harm absent an injunction. *Arizona*, 567 U.S. at 397. The increase in the presence of illegal aliens will inflict significant financial costs on the States, including but not limited to healthcare, education, as well as enforcement and correctional services.

As the Court has previously observed, these financial injuries are irreparable. *See* ECF 79 at 145–46, citing *Texas v. United States*, 524 F. Supp. 3d 598, 663 (S.D. Tex. 2021). Sovereign immunity prevents the States from recovering from the Defendants the money they have spent in the past and will have to spend in the future to furnish social and educational services to illegal aliens who would have been detained and

removed but for the September 30 Memorandum. *Id.* Nor can the States recover the money they have spent in the past and will have to spend in the future to incarcerate illegal aliens who would have been detained and removed or deported but for the September 30 Memorandum. *Id.*; *see also Texas DAPA*, 809 F.3d at 186. Indeed, the Fifth Circuit rebuffed an attempt by Texas in the late 1990s to force the federal government to pay medical, educational, and criminal justice expenditures caused by immigration. *See Texas*, 106 F.3d at 663–64.

As for injuries to the States' interests as *parens patriae*, as the Court has previously found, *see* ECF 79 at 146, injuries to "law enforcement and public safety interests" can constitute irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1303, (2012) (granting a stay of a judgment after finding Maryland experienced ongoing irreparable harm because it was enjoined from effectuating a statute that assisted government officials in investigating crimes and arresting violent offenders) (Roberts, C.J., in chambers). Here, law-enforcement and public-safety interests underlie the States' *parens patriae* injuries. Accordingly, the States have demonstrated they are "likely to suffer irreparable harm in the absence of preliminary relief." *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018).

B. Balance of hardships and public interest

Because this case involves governments as the parties, the final two elements, the balance of hardships and the public interest, "merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *accord Texas DAPA*, 809 F.3d at 187. The balance of the hardships favors the States, and the public interest will be served by barring the Defendants' use of the September 30 Memorandum and requiring their compliance with Section 1226(c) and 1231(a)(2).

Without an injunction, the States will suffer continued harm to their state budgets and interests as *parens patriae*. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. 3d 660, 694 (N.D. Tex. 2016).

The harms the Defendants assert do not outweigh these harms to the States and their residents. The reduction in the Defendants' discretion resulting from an injunction does not qualify as a harm; "Congress [has] mandate[d] that the Executive Branch detain certain noncitizens during removal proceedings or before removal." *Preap*, 139 S. Ct at 973 (Kavanaugh, J., concurring). The discretion that will be constrained is not permitted by Sections 1226(c) and 1231(a)(2); should the Defendants wish to exercise discretion over the detention decisions addressed in the September 30 Memorandum, that is a matter for Congress, not the Court.

The inefficiency the Defendants assert would result from an injunction is entitled to little weight. First, any inefficiency resulting from an injunction against the Defendants' September 30 Memorandum is "outweighed by the major financial losses [that] states face." *See Texas DAPA*, 809 F.3d at 187. Allowing the Defendants to continue implementing the challenged policies will result in significant financial losses for the States. *See* Exs. F–H, L. Second, rather than dictate how they use scarce resources, an injunction would preclude the Defendants "from instructing officials to act in a manner contrary to a clear congressional mandate. In other words, the Government remains free to expend its resources in a lawful manner." ECF 79 at 150. "[T]he Executive—and thus, the Attorney General or the Secretary of DHS—must exercise any discretion accorded to it by statute in the manner which Congress has prescribed." *Id.* at *40. The Defendants would remain free to allocate resources in any way that they want, so long as it does not violate the law. To the extent following the law is inefficient (and Plaintiffs do not agree that it is), Congress chose to trade efficiency for certainty when it mandated rather than suggested detention.

The Court has already summarized the point:

> "[T]he public is served when the law is followed," *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013), including when the Defendants obey, rather than violate, a congressional command. An injunction requiring to do the former and forbidding the latter is thus in the public interest. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d. 1211, 1221 (D.C. Cir. 1981) (collecting cases) ("[T]he public interest in enforcement of the immigration laws is significant."); *cf. Nken*, 556 U.S. at 436 ("There is always a public interest in prompt execution of removal orders[.]"). The public interest is particularly strong here because . . Sections 1226(c) and 1231(a)(2) are statutes that Congress enacted for the benefit of the United States, its citizens, and its legal immigrants. [ ] *Demore*, 538 U.S. at 518–21 []; *Zadvydas*, 533 U.S. at 697 [].

B. Scope of injunctive relief

1. Geographic scope

A federal district court, under "appropriate circumstances," has authority "to issue a nationwide injunction." *Texas DAPA*, 809 F.3d at 188. The Court has already recognized this principle and two such circumstances. *See* ECF 79 at 151–52. One such circumstance is the need to ensure uniformity in immigration policies as prescribed by federal law. *Id.* at 152 (citing *Texas DAPA*, 809 F.3dat 187–88, and *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020) ("[C]ases implicating immigration policy have a particularly strong claim for uniform, nationwide relief." (citation omitted))). Another such circumstance is when "there is a substantial likelihood that a geographically-limited injunction would be ineffective because [the] beneficiaries [of the unlawful policy] would be free to move among states." *Id.* (citing *Texas DAPA*, 809 F.3d at 188).

As the Court has already concluded, both circumstances exist here. ECF 79 at 152. First, the September 30 Memorandum affectsnational immigration policy, which is designed to be uniform. *Id.* (citing *Texas DAPA*, 809 F.3d at 187–88). Second, a geographically limited injunction is insufficient to protect the States from irreparable harm because aliens not detained in other states are able to move to Texas and Louisiana. *Id.* (citing *Texas DAPA*, 809 F.3d at 188). More than 50,000 noncitizens moved into Texas from another state in 2019—roughly half of all net in-migration to the state. Ex. U at 4–5; Ex. W. This is consistent with data showing that tens of thousands of foreign-born persons moved to Texas from another state each year from 2006–2013. Ex. V at 6.

2. Substantive scope

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *ODonnell v. Harris Cnty.*, 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Califano v. Yamaski*, 442 U.S. 682, 702 (1979)). An injunction must be "narrowly tailor[ed] . . . to remedy the specific action which gives rise to the order." *ODonnell v. Goodhart*, 900 F.3d 220, 224 (5th Cir. 2018) (quoting *Doe v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004)).

Here, the States' injuries are being specifically caused by the non-detention and deportation or removal of illegal aliens, as required by Sections 1226(c) and 1231(a)(2), due to the September 30 Memorandum. The specific portions of the September 30 Memorandum causing those aliens not to be detained and deported or removed are Sections II and VI, which announce and implement the policies that directly contravene the mandates in Sections 1226(c) and 1231(a)(2). *See Util. Air Reg. Grp.*, 573 U.S. at 327; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

It is therefore appropriate to enjoin the Defendants from implementing and enforcing the September 30 Memorandum. Specifically, the Court should enjoin the

Defendants; their agents, attorneys, and employees; and all those acting in concert with them, either directly or indirectly: (1) from enforcing Sections II and VI of the September 30 Memoranda and (2) to in good faith: (a) identify aliens who satisfy one of the criteria listed in Section 1226(c)(1)(A)–(D) and take into custody any such aliens as required by Section 1226(c)(1), (b) refrain from releasing any such aliens except as permitted by 8 U.S.C. § 1226(c)(2), and (c) detain aliens with final orders of removal during the removal period as required by Section 1231(a)(2).

The Defendants have argued against enjoining the enforcement of the September 30 Memorandum based on ill-founded concerns that doing so might interfere with other DHS and ICE functions. The Memorandum, they contend, covers agency functions beyond the issuance of detainers to state and local law-enforcement agencies, and barring them from enforcing or implementing it will disrupt their attempt to set priorities for agents responsible, for example, for investigations or pursuing fugitives. To the extent that is true, it is irrelevant.

First, an injunction would not bar the agency from issuing an interpretive rule or statement of policy stating how agents should prioritize their efforts. *See Nat. Res. Def. Council v. Wheele*r, 955 F.3d 68, 85–86 (D.C. Cir. 2020) (listing examples to "highlight that EPA had several options by which it could have attempted to address the perceived difficulties" and that "promulgating a legislative rule without abiding by notice-and-comment requirements" was not one of them). The Defendants themselves furnished examples of in the administrative record. *See* AR 4–7 (ECF 146-4–146-7). Second, should the Court believe that an injunction against Sections II and IV in their entirety would go too far, it can limit its decree to prohibit their enforcement and implementation only to the extent that they apply to decisions to issue or rescind detainers. "As the Supreme Court has explained, when a court encounters statutory or regulatory text that is 'invalid as applied to one state of facts and yet valid as applied to another,' it should 'try to limit the solution to the problem'

by, for instance, enjoining the problematic applications 'while leaving other applications in force.'" *Wheeler*, 955 F.3d at 81–82 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) and citing *Greater New Orleans Broadg. Assn. v. United States*, 527 U.S. 173, 195–96 (1999)). *See also*, *e.g.*, *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017) (Kavanaugh, J.) (vacating EPA rule "to the extent it requires manufacturers to replace HFCs with a substitute substance").

The Defendants have argued that they should not be required to comply with Section 1226(c) and 1231(a)(2) because there is not sufficient detention capacity in their agencies to do so. This concern, too, is ill-founded. When Congress mandated "increased detention to ensure removal," it provided "budget enhancements." INS & EOIR, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR 10312-01, 10,323 (Mar. 6, 1997); *see* ECF 18 at 3. In any event, the States seek not an injunction requiring immediate compliance, but a good-faith attempt to comply. The Fifth Circuit has upheld a similar injunction that required far more than the States ask for here, affirming a decree that required the federal government to negotiate in good faith with a foreign state to reinstitute a program that the federal government had cancelled. *See Texas MPP*, 20 F.4th at 1002. The "good faith" qualifier, that is, prevents the injunction from requiring the impossible. *Id.* at 1001–02.

More, the federal government is familiar with the obligation to act in good faith; for example, it placed upon itself "the duty to bargain [with government-employee unions] in good faith," 5 U.S.C. § 7117, and federal-government contracts carry with them an implied obligation that the government will deal with the counterparty fairly and in good faith. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). The Defendants therefore know how to comply with an injunction requiring them to comply with Sections 1226(c) and 1231(a)(2) "in good faith"—by honestly and

faithfully pursuing the obligations set forth in those statutes in a manner that does not undermine those obligations; by pursuing those obligations with an open mind and a view to complying with the Court's order. *See, e.g.*, "good faith," Black's Law Dictionary 836 (11th ed. 2019); "good-faith bargaining," *id.* 836–37; *Metcalf*, 742 F.3d at 991.

C. Vacatur is warranted.

The September 30 Memorandum is unlawful and invalid and should be vacated in its entirety as a result.

A "reviewing court shall . . . hold unlawful and set aside agency action" that violates the APA. 5 U.S.C. § 706(2) (emphasis added). "[D]istrict courts have a duty to vacate unlawful agency actions." *Franciscan Alliance*, 414 F. Supp. 3d at 945.

Because the Defendants have violated the APA, the Court should issue a decree vacating their invalid action.

D. Declaratory relief is warranted.

"The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ. P. 57.

The States have established that the September 30 Memorandum was issued in violation of the APA and are entitled to a declaration delineating the rights and legal relations among themselves and the Defendants. The Court should issue such a declaration.

CONCLUSION

The States respectfully request that the Court render judgment in their favor.

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CERTIFICATE OF SERVICE

I certify that on March 18, 2022, this document was filed through the Court's CM/ECF system, which automatically serves all counsel of record.

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