No. 22-3272

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF ARIZONA, STATE OF MONTANA, AND STATE OF OHIO, Plaintiffs-Appellants, v. JOSEPH R. BIDEN, ET AL., Defendants-Appellees.	:	On Appeal from the United States District Court for the Southern District of Ohio District Court Case No. 3:21-cv-314-MJN

OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Two statutes mandate that DHS arrest and remove specified aliens. 8 U.S.C. §§1226(c)(1), 1231(a)(1)(A). DHS's "Permanent Guidance" forbids immigration officers from arresting or removing those aliens unless extra-statutory factors support arrest and removal. *See* R.4-1, PageID#99–101. The Guidance is therefore illegal.

DHS does not seriously argue otherwise. Instead, it claims discretionary, unreviewable power to ignore or abide by Congress's commands. Accepting that argument would make DHS a "law unto itself." *Texas v. Biden (MPP)*, 20 F.4th 928, 997 (5th Cir. 2021). Those who may cheer such a result today will feel otherwise once "another administration" claims similar authority to violate the law in the other direction. *In re MCP No. 165*, 20 F.4th 264, 273 (6th Cir. 2021) (Sutton, J., dissenting from denial of initial hearing *en banc*). If the "President" is not "above the law," *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring in the judgment), neither is an agency.

The District Court partially enjoined the Permanent Guidance. Rightly so. This Court should deny DHS's stay request.

STATEMENT

1. This case involves DHS's refusal to follow two statutes. The first says that the government "*shall* take into custody," immediately upon their release from detention, certain criminal aliens. 8 U.S.C. §1226(c)(1) (emphasis added). With this

statute, "Congress mandated" the arrest of aliens it believed posed a "heightened risk." *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019). The second statute says DHS "*shall* remove" an alien within 90 days after a final order of removal. §1231(a)(1)(A) (emphasis added). This too is mandatory: "DHS *must* physically remove" such aliens "from the United States within a 90-day 'removal period.'" *Johnson v. Guzman Chavez*, 141 S.Ct. 2271, 2281 (2021) (emphasis added).

DHS's Permanent Guidance limits DHS officers' discretion to comply with these commands. It provides that officers may carry out the mandatory arrests and removals *only if* various non-statutory factors indicate the alien is sufficiently worthy of arrest and removal. R.4-1, PageID#99–101. For example, while Congress required the arrest and removal of criminal aliens who committed aggravated felonies, §1226(c)(1)(B), the Permanent Guidance *forbids* DHS from doing so unless "an assessment of the individual and the totality of the facts and circumstances" supports such action. R.4-1, PageID#100.

DHS Secretary Mayorkas described this approach as "fundamentally chang[ing] immigration enforcement in the interior." Camilo Montoya-Galvez, *After 1 year and many changes, Biden's immigration record frustrates opponents and allies alike*, CBS News (Jan. 20, 2022), https://perma.cc/UE8Z-PHV2. So it has: the Permanent Guidance and its interim-predecessors have dramatically reduced

immigration enforcement. *See* R.4-7, PageID#167; R.4-8, PageID#178–79. From January through July 2021, ICE—a DHS subagency—removed *ten times* fewer aliens than it did during the same period in 2019. Jessica M. Vaughan, *Deportations Plummet Under Biden Enforcement Policies*, Center for Immigration Studies (Dec. 6, 2021), https://perma.cc/U8YJ-BT76. No matter the category of crime—homicide, aggravated assault, burglary, kidnapping, robbery, or sexual assault—removals of dangerous aliens are down. *Id.* This is what DHS considers a success. Stay Motion ("Mot.") at 1.

2. To protect themselves and their citizens, the States filed suit challenging the Guidance under the APA. They moved for a preliminary injunction. The District Court granted their motion, concluding that the Permanent Guidance was illegal on three separate grounds. Op., R.44, PageID#1119–38. About a week later, DHS filed a notice of appeal and asked the District Court to stay its ruling. The District Court refused, so DHS turned to this Court.

ARGUMENT

DHS cannot satisfy any of the stay-pending-appeal factors: it has not made a "strong showing" of likely success on the merits; it will not be irreparably injured absent a stay; a stay would substantially injure the other parties; and a stay is contrary

to the public interest. *Tiger Lily, LLC v. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 522 (6th Cir. 2021).

I. DHS will not likely succeed on the merits

"When a party has no likelihood of success on the merits, [the Court] may not grant a stay." *Id.* DHS will not likely prevail, as the District Court correctly determined. Rather than taking that head on, DHS primarily argues that the courts cannot review its lawless conduct. But its arguments on that score fare no better. At most, DHS shows that it *might* prevail—it has not come close to making a "strong showing" of likely success, as it must to win a stay. *Kentucky*, 23 F.4th at 593.

A. The District Court had the power to decide this case

1. The States have Article III standing

a. Plaintiffs have standing to sue if they sustain an injury in fact, fairly traceable to the defendant's conduct, that can be redressed by a favorable ruling. *Spokeo, Inc. v. Robins*, 579 U.S. 330, 337–39 (2016). States are "entitled to special solicitude" throughout this analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *Kentucky v. Biden*, 23 F.4th 585, 598–99 (6th Cir. 2022). Perhaps for that reason, every court to have considered whether States have standing to challenge the Permanent Guidance or its predecessor policies has held they do. Op., R.44, PageID#1086–95; *Texas v. United States*, No. 6:21-CV-00016, —F.Supp.3d—, 2021 WL 3683913, at *10–20 (S.D. Tex. Aug. 19, 2021); *Arizona v. DHS*, No. CV-21-186, 2021 WL 2787930, at *6

(D. Ariz. June 30, 2021); *Florida v. United States*, 540 F.Supp.3d 1144, 1155–56 (M.D. Fla. 2021), *vacated as moot*, No. 21-11715, 2021 WL 5910702 (11th Cir. Dec. 14, 2021).

Begin with the facts: the Permanent Guidance and its predecessors intentionally neutered immigration enforcement. In December 2021, ICE detained an average of only 4,296 aliens per day with criminal convictions or pending criminal charges resulting from interior enforcement. FY2022 ICE Detention Statistics, https://perma.cc/D6ST-RYSQ (Detention FY22 tab, rows 73 and 74). Compare that to December 2019, when ICE averaged 16,388 detentions per day or December 2020—in the midst of a global pandemic that strained agency resources—when the per-day rate hit 10,336. FY2020 ICE Detention Statistics, https://perma.cc/636D-CXMS (Detention EOFY2020 tab, rows 56 and 57); FY2021 ICE Detention Statistics, https://perma.cc/3M3X-DZ7D (Detention FY21 YTD tab, rows 73 and 74). In fiscal year 2021, removals fell *70 percent* compared to fiscal year 2020. James Remsen, *Deportations fell to 26-year low last year, ICE report reveals*, N.Y. Post (Mar. 11, 2022), https://perma.cc/SQW4-W6XM. Removals of serious criminal aliens in 2021 (January through July) fell *more than three times* compared to the same period in 2019 and more than *twice* compared to 2020. Jessica M. Vaughan, *Deportations Plummet Under Biden Enforcement Policies*, Center for Immigration Studies (Dec. 6, 2021), https://perma.cc/U8YJ-BT76.

DHS's underenforcement will mean more of these individuals remain in our communities: while the Guidance may not explicitly "require[] a reduction in immigration enforcement," Mot. 7, there is no doubt it has caused the reduction, Op., R.44, PageID#1089–93. During earlier litigation, Acting Phoenix ICE Director Albert Carter said that the *only* cause for the drop-off in ICE arrests he could fathom was the interim guidance. R.4-11, PageID#200. The same logic applies to the Permanent Guidance.

These facts cause two injuries to the States. First, monetary harms. More criminal aliens means greater costs associated with recidivist crime. *See MPP*, 20 F.4th at 967–69; *Texas*, 2021 WL 3683913, at *12. And federal law *requires* the States to provide emergency healthcare and education to illegal aliens. *MPP*, 20 F.4th at 969; 42 C.F.R. §440.255(c). Greater numbers of aliens means more expenditures, which means the States have a "likelihood of economic injury." *Clinton v. City of New York*, 524 U.S. 417, 432 (1998). The District Court found the States would indeed sustain these costs, Op., R.44, PageID#1090–91, and that finding is subject to clear-error review, *Thompson v. DeWine*, 976 F.3d 610, 614 (6th Cir. 2020) (*per curiam*), which DHS does not even try to satisfy.

Second, the Guidance injures the States' quasi-sovereign interests. All States have quasi-sovereign interests in their territory and the movement of people within

it, along with the "health and 'economic well-being' of their populaces." *Kentucky*, 23 F.4th at 599; *Massachusetts*, 549 U.S. at 517–20. And, like all other sovereigns, they have an interest in "exclud[ing] from the sovereign's territory people who have no right to be there." *Arizona*, 567 U.S. at 417 (Scalia, J., dissenting). The Permanent Guidance undermines these interests by causing the presence of more illegal aliens—particularly those with prior criminal convictions. The States "surrender[ed] certain sovereign prerogatives" to the federal government when they joined the Union. *Massachusetts*, 549 U.S. at 518–19. When the federal government fails to uphold its end of the bargain—when its actions undermine sovereign interests the States can no longer address—it injures the States. *Id.* That matters here because the States lack authority to enforce immigration laws. *See Arizona*, 567 U.S. at 397. They sustain a quasi-sovereign injury when the federal government fails to do so. *Texas v. United States (DAPA)*, 809 F.3d 134, 151 (5th Cir. 2015).

All these injuries are fairly traceable to the Guidance. And all are redressable with an injunction. Even if "DHS cannot enforce the INA against all noncitizens potentially described in" the statutes the Permanent Guidance ignores, Mot.9, the injunction frees DHS officials to follow federal law without regard to the Guidelines, which will lead to more enforcement and redress the States' injuries to some degree. *See* Op., R.44, PageID#1094–95. Indeed, DHS previously admitted as much. Again,

in earlier litigation, Acting Phoenix ICE Director Albert Carter could point *only* to the policy, not any other factor—such as resource limitations or COVID-19—that could have caused the drastic drop in enforcement starting February 2021. R.4-11, PageID#200. There is no reason to doubt this is true of the Permanent Guidance.

b. DHS's counterarguments all fail. It stresses that no one has "a judicially cognizable interest in the prosecution or nonprosecution of another." Mot.6 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). But the States did not sue to enforce any such interest—they sued to protect themselves from judicially cognizable financial and quasi-sovereign injuries. *See, e.g.*, *Texas*, 2021 WL 3683913, at *12; *Arizona*, 2021 WL 2787930, at *7. Moreover, the cases DHS cites for this proposition show only that no "private citizen" has a judicially cognizable interest in the prosecution of a particular person. *Linda R.S.*, 410 U.S. at 619. No case bars parties—let alone non-private parties, like the States—from suing to enjoin a sweeping non-enforcement policy that causes them financial or otherwise-cognizable harm. Indeed, *Linda R.S.* based its no-standing holding in part on the fact that the plaintiff failed to allege how enjoining the challenged policy would redress her financial injury. 410 U.S. at 618.

DHS also argues that the States' injuries are self-inflicted. Mot.8. That is false. "Federal law affirmatively *requires* the States to make some of those

expenditures," including those related to Medicaid and education. *MPP*, 20 F.4th at 969 (Emergency Medicaid). The other costs relate to law enforcement. Expenditures made to protect the public from dangers imposed by DHS's policies are hardly "self-imposed."

DHS would like this court to weigh potential benefits under the Permanent Guidance. Even assuming the Permanent Guidance does create some benefits, which is not apparent, standing is "not an accounting exercise." *DAPA*, 809 F.3d at 156. A plaintiff does not lose standing to challenge harmful agency action simply because he may also derive some benefit from it. DHS does not cite a single contrary case.

One final point. DHS insists the injunction below thwarts the separation-of-powers principles that standing doctrine exists to protect. Mot.7. No. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Congress enacted §1226(c) and §1231(a). The Permanent Guidance violates them. There is nothing remotely improper about the courts saying so.

2. The Permanent Guidance is reviewable

DHS makes three arguments for concluding that the Permanent Guidance is unreviewable under the APA. Each fails.

Committed to agency discretion. DHS first argues that the Permanent Guidance deals with issues committed to agency discretion by law. That is wrong.

The APA creates a "strong presumption in favor of judicial review." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). One "very narrow exception" to that presumption is for agency action "committed to agency discretion by law." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); 5 U.S.C. §701(a)(2). This "no law to apply" exception applies only to the most standardless of statutes. In *Barrios Garcia v. DHS*, 14 F.4th 462 (6th Cir. 2021), for example, this Court rejected the argument that DHS's delay in issuing work visas was committed to agency discretion. The relevant statute provided: "The [DHS] Secretary *may* grant work authorization to any alien who has a *pending*, *bona fide* application for nonimmigrant status …." 8 U.S.C. §1184(p)(6) (emphasis added). The Court held that, despite the statute's discretionary "may," the terms "pending" and "bona fide" supplied judicially manageable standards that permitted review. *Barrios Garcia*, 14 F.4th at 481.

DHS argues that enforcement decisions are generally committed to an agency's discretion. Mot.9. True, but the States are not challenging any particular decision not to arrest or remove an alien. They are challenging a (non)enforcement policy, and the committed-to-agency-discretion doctrine does not foreclose such challenges. *MPP*, 20 F.4th at 978–88, 997–98; *see also Am. Acad. of Pediatrics v. FDA*,

379 F. Supp. 3d 461, 481, 485 (D. Md. 2019); *Pub. Citizen Health Rsch. Grp. v. Acosta*, 363 F. Supp. 3d 1, 18 (D.D.C. 2018); *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998). Moreover, "the presumption" that enforcement decisions are committed to agency discretion "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985). Congress did so here: §1226(c) and §1231(a), by specifying that DHS "shall" arrest and remove certain specifically identified aliens on certain timeframes, provide quite clear guidelines.

Zone of Interests. APA plaintiffs must point to an interest that is "arguably within the zone of interests to be protected or regulated by the statute [they] say[] was violated." *Patel v. U.S. Citizenship & Immigr. Servs.*, 732 F.3d 633, 635 (6th Cir. 2013). The test is not "especially demanding," given the APA's presumption of review and the "benefit of any doubt goes to the plaintiff." *Id.* A plaintiff fails the test only if his interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

DHS seems to argue that only aliens can bring APA cases arguing a procedural violation or a violation of the immigration laws. Mot.11. Caselaw shows otherwise.

See, e.g., *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *DAPA*, 809 F.3d at 162–63. And rightly so. The States bear "many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. Congress enacted the statutes at issue here to relieve the States of problems created by too-forgiving immigration laws. *Demore v. Kim*, 538 U.S. 510, 518 (2003). Because the States were the intended *beneficiaries* of the these and other laws, their interests cannot be dismissed as "marginally related or inconsistent" with those laws—and if the question is close, the States get the "benefit of any doubt." *Patel*, 732 F.3d at 635.

Final Agency Action. DHS does no better arguing that the Permanent Guidance is not a final agency action reviewable under the APA. *See* Mot.11–13.

A "final agency action" is "one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016). The Permanent Guidance creates such consequences. While the statutes obligate DHS to take into custody §1226(c) aliens, and quickly remove §1231(a) aliens with final orders of removal, the Permanent Guidance requires "something quite different." *Texas*, 2021 WL 3683913, at *25. ICE officers have been stripped of their statutory duties by the Permanent Guidance, and are "require[d]" to perform "an assessment of the individual and the totality of the facts and circumstances," which may or may not lead to an arrest of an individual

previously subject to enforcement action by law. R.4-1, PageID#100. In addition, the Permanent Guidance creates legal obligations for the States: again, federal law *requires* the States to expend money on the aliens the Permanent Guidance protects.

DHS says the Guidance is merely suggestive and does not create "rights or obligations." Mot.11. But the Permanent Guidance plainly denies discretion to ICE officers, who were previously required to arrest §1226(c) aliens leaving criminal custody, and "*requires*" them to perform a non-statutory "assessment of the individual and the totality of the facts and circumstances," which may or may not lead to an arrest of an individual previously subject to enforcement action by law. R.4-1, PageID#100 (emphasis added). Because the Permanent Guidance "*require[s]* DHS to enforce the law in a different way" than Congress's statutes, it "constitute[s] a change in DHS's legal obligations." *Texas*, 2021 WL 3683913, at *25.

DHS also argues the Permanent Guidance is non-final because States are not directly affected. Mot.12. But the States *are* directly affected. The States' community-supervision duties arise directly when ICE officers apply the Guidance and, for example, lift a detainer. *See* Mot. to Suppl. Ev., Ex. U, R.39-1, PageID#1002. Here, the Permanent Guidance has already led to underenforcement by DHS, and that underenforcement will mean the States owe legal obligations to more criminal aliens. The Permanent Guidance thus itself imposes costs on the States.

B. The Permanent Guidance will be set aside under the APA for three separate reasons

The APA requires courts to "set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2). And, with an exception not relevant here, agencies may promulgate rules only after engaging in notice-and-comment rulemaking. 5 U.S.C. §553. The Permanent Guidance flunks all these requirements: it is contrary to law, arbitrary and capricious, and DHS illegally promulgated it. The District Court agreed. To grant a stay, this Court "would have to conclude that" the District Court erred in all three respects. *In re MCP NO. 165*, 21 F.4th 357, 390 (6th Cir. 2021) (Larsen, J., dissenting), *stayed by NFIB v. OSHA*, 142 S. Ct. 661 (2022). In contrast, the Court must deny the stay motion if it concludes the States "are likely to succeed on just one ground." *Id.* Here, the States will likely prevail on each of these independently sufficient grounds.

1. The Permanent Guidance is contrary to law

Federal law *requires* DHS to arrest and remove certain aliens. 8 U.S.C. §§1226(c)(1), 1231(a)(1)(A). The Permanent Guidance *forbids* immigration officers from doing so unless they first determine that arrest or removal is justified by a set of extra-statutory factors. The Guidance is therefore contrary to law.

DHS makes a counterargument, "but its heart is plainly not in it." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021). Indeed, even though this is the main issue in the case, DHS can muster only a single paragraph on the matter. It first says that neither §1226(c) nor §1231(a) contains a command. But both say that DHS "shall" take into custody or remove *specific* categories of aliens, and DHS has never explained how these statutes could be anything other than commands. Indeed, DHS recently told the Supreme Court that §1226(c) takes the "discretionary authority" that the DHS Secretary usually has "and it turns it into a *mandate* to the Secretary that [he] shall arrest these certain criminal aliens." Oral Arg., *Nielsen v. Preap*, 2018 WL 4922082, at *9 (U.S. Oct. 10, 2018).

DHS also argues that the Permanent Guidance is consistent with these statutes, as it does not "forbid immigration officers from initiating enforcement action against anyone covered by" either §1226(c) or §1231(a). Mot.13. But this just ignores the States' objection. The problem with the Permanent Guidance is not that it makes enforcement literally impossible; instead, the problem is that the Guidance allows officials to take actions that Congress made mandatory *only if* they first determine that extra-statutory factors are satisfied. While officers might consider those factors and still take action, the Guidance unlawfully limits their discretion to take

actions—arresting an alien subject to §1226(c), or removing an alien subject to §1231(a)—that Congress already determined are *always* permissible.

2. The Permanent Guidance is arbitrary and capricious

Agencies act arbitrarily and capriciously when they "rel[y] on factors which Congress had not intended [them] to consider, entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence," or adopt a position that "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 407 (6th Cir. 2016) (quotation omitted).

The District Court correctly applied this standard, and concluded that the Permanent Guidance was likely arbitrary or capricious for three reasons. Op., R.44, PageID#1122–31.

First, DHS failed adequately to consider the problem of criminal-alien recidivism. Op., R.44, PageID#1122–26. DHS insists otherwise, but offers little more than *ipse dixit*. Mot.14. And the *ipse dixit* turns out to create more problems than it solves. For example, DHS points to language in the Considerations Memo suggesting that "recidivism is best addressed by directing officers to engage" in an individualized analysis. *Id.* (quoting R.27-2, PageID#454). But, as DHS recently told the Supreme Court, the whole purpose of §1226(c) was to get immigration officers out

of "the business of trying to predict which criminal aliens will actually flee or reoffend." Pet. Br., *Nielsen v. Preap*, 2018 WL 2554770 at *23 (U.S. June 1, 2018). In considering whether individualized assessments might work better, DHS relied "on factors which Congress had not intended it to consider." *Sierra Club*, 828 F.3d at 407. In any event, nothing in the agency record shows that DHS ever attempted to identify the costs of recidivism or to determine whether those costs were justified. While DHS pointed to a study assessing the criminality of aliens versus citizens *generally*, Considerations Memo, R.27-2, PageID#45, there is no evidence it made any attempt to determine the risk of recidivism presented by *criminal aliens* subject to §1226(c). The agency failed to consider this aspect of the problem before it.

Second, the Permanent Guidance fails to meaningfully consider the impact on States. Op., R.44, PageID#1127–28. DHS asserts that it did consider State costs, pointing to its Considerations Memo. But in the memo, it simply announced that the Guidance's effect on the States, while difficult to calculate, would likely be beneficial. R.27-2, PageID#457. The inability to *calculate* the costs, however, hardly excused the agency from giving those costs meaningful consideration. Moreover, looking at the Considerations Memo, DHS says *the aliens* benefit from freedom to access social services without fear of apprehension. R.27-2, PageID#458. It does

not address how or whether *the States* benefit from having an increased population of criminal aliens.

Finally, DHS offered no reasoned explanation for adopting Permanent Guidance. Op., R.44, PageID#1129–31. DHS claimed it adopted the Permanent Guidance because it had "insufficient resources" to take enforcement actions against the more than 11 million illegal aliens in the country. Considerations Memo, R.27-2, PageID#447–49. But the 11 million figure includes *all* potentially removable aliens the vast majority of whom are not subject to §1226(c) or §1231(a)(1) and thus unaffected by the Guidance. How did DHS resource justify *the particular* prioritization scheme set forth in the Guidance? It never seriously grappled with the issue. While it offered platitudes about the need to "focus" its enforcement "efforts on those noncitizens who pose the greatest threat to national security, public safety, and border security," *id.*, the record shows it is not even using all the resources it has now. Op., R.44, PageID#1129-30; R.27-2, PageID#448. Further, ICE has canceled contracts with detention centers and asked Congress to decrease its funding for detention resources. Pricilla Alvarez, *Biden administration to close two immigration detention centers that came under scrutiny*, CNN (May 20, 2021), https://perma.cc/DW3T-5GGR; Budget Request Analysis: FY2022, Congressional Research Service 13 (June

25, 2021), https://perma.cc/3KVA-7ZUN. To any fairminded observer, the resource-constraint concern is wholly pretextual to DHS's nonenforcement scheme.

3. DHS unlawfully promulgated the Permanent Guidance without going through the notice-and-comment process

DHS improperly promulgated the Permanent Guidance. In general, all "substantive" rules—rules that affect individual rights and obligations—must be promulgated through notice and comment. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). General statements of policy—statements without binding force—need not. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). A rule is binding and thus 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." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citations omitted).

The Permanent Guidance is substantive because it has binding force. Aliens that do not pass the Guidance's balancing test are virtually guaranteed *not* to be detained and deported. "DHS established a 'binding norm' on both noncitizens and its officials by displacing the detention and removal standards set forth by Congress." Op., R.44, PageID#1134. Because this substantive rule was not promulgated through notice-and-comment rulemaking, it is illegal. *See* 5 U.S.C. §706(2)(D); *DAPA*, 809 F.3d at 171–76.

DHS says the Permanent Guidance provides merely "internal agency expectations." Mot.19. That representation betrays the text of the Guidance, its effects, and Secretary Mayorkas's own understanding. The Permanent Guidance "requires" an assessment prior to arrest different from the statutes. R.4-1, PageID#100. It then demands "[e]xtensive" and "continuous" training, alongside "rigorous review" to "achieve quality and consistency in decision-making across the entire agency." R.4-1, PageID#103. The Permanent Guidance and its predecessor policies have achieved the lowest number of removals in three decades. James Remsen, *Deportations fell to 26-year low last year, ICE report reveals*, N.Y. Post (Mar. 11, 2022), https://perma.cc/SQW4-W6XM. As Secretary Mayorkas says, the Permanent Guidance has "fundamentally changed immigration enforcement in the interior." *See above* at 2. Because the Permanent Guidance is binding on its face and in practice, it is a substantive rule and requires notice and comment.

II. DHS will not suffer irreparable harm under the present injunction

Even though "no substantial harm can be said to inhere" in the enjoining of an illegal policy, *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.,* 274 F.3d 377, 400 (6th Cir. 2001), DHS insists the injunction below will irreparably harm it. Its arguments all fail.

It begins by insisting that the injunction constitutes "an improper intrusion by a federal court into the workings of a coordinate branch of the Government." Mot.17 (quotation omitted). This wrongly assumes DHS will prevail—if the States have the power to sue and prevail on the merits, the injunction does not *improperly* intrude on DHS's operations.

DHS next argues it will be harmed if it has to "adopt a new interim enforcement policy and retrain thousands of officers." Mot.18. This makes little sense. DHS could simply tell its agents that the enjoined sections of the Permanent Guidance are no longer in effect, and that ICE officers can now enforce §1226(c) and §1231(a) without regard to the Guidance-imposed limits. DHS responded to an injunction of an earlier policy with an email directing a return to normal operations. R.4-4, PageID#149 ("[ICE] employees should return to normal removal operations as prior to the issuance of the January 20, 2021 memorandum.") It can do the same thing here. And the fact that it took DHS almost a week to appeal the District Court's ruling—during which it was presumably complying with the injunction (or acting in contempt of court)—shows that compliance imposes no great burden. In any event, the difficulty of having the follow the law is not irreparable harm.

Finally, DHS argues that its policy has "proven results" and insists that, if made to follow the law, it "may" have to divert resources from the border. Mot.18–

19. It never explains why. The injunction does not tell the DHS where or how to deploy its resources—it simply bars DHS from *forbidding* agents from applying the law. DHS can still set prioritization categories. And it can still send agents wherever it wishes. All it must do is stop enforcing guidance that requires extra-statutory permission to arrest or remove the aliens Congress has categorically identified.

There is insufficient space to address the obviously false claim that DHS's immigration policies are "proven" successes. Mot.18. It suffices to say this: even if DHS is right, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (*per curiam*).

III. The remaining factors weigh against a stay

The remaining factors militate against granting a stay.

The Permanent Guidance inflicts very real costs on the States. DHS's non-enforcement means *tens of thousands* more criminal aliens will remain in the States. "Local law enforcement must respond to crimes … committed by" these individuals; "federal law requires Emergency Medicaid dollars to be spent on" their care; "and public schools must enroll noncitizen children." Op., R.44, PageID#1090. The Permanent Guidance will cause the States to bear more of those costs. And

because the federal government has sovereign immunity, there is no way for the States to recover those costs.

With respect to the final factor, "the public interest lies in a correct application of the federal constitutional and statutory provisions" at issue. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (quotation marks omitted). Because the Permanent Guidance is illegal, the injunction necessarily promotes the public interest. *Realtors*, 141 S. Ct. at 2490.

*

One final point. The District Court correctly entered a nationwide injunction, after thorough consideration. Op., R.44, PageID#1141–45. True enough, courts should issue relief that is no broader than necessary to redress the plaintiffs' injuries. But people travel, and so an order making the Permanent Guidance unenforceable only in the three plaintiff States would not fully redress their injuries: out-of-state aliens who are neither arrested nor removed would be free to enter Ohio, where they inflict the same costs that caused the States to sue. Moreover, because DHS operates nationwide, a state-specific injunction cannot work: even if officials must arrest and detain aliens in the three plaintiff States, that achieves nothing when the same aliens are released upon being transferred to a facility in another State.

CONCLUSION

The Court should preserve the district court's injunction.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this motion complies with the type-volume requirements and contains 5,138 words. *See* Fed. R. App. P. 27(d)(2)(A).

I further certify that this motion complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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