No. 22-3272

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF ARIZONA, et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio

MOTION FOR STAY OF THE DISTRICT COURT'S MARCH 22, 2022 ORDER PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

H. THOMAS BYRON III
MICHAEL SHIH
SEAN R. JANDA
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3388

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

STATEMENT 2

A. Statutory Background 2

B. Factual Background 3

C. Procedural Background 4

ARGUMENT 5

I. The Government Is Likely To Prevail On The Merits. 5

A. Plaintiffs' Claims Are Barred At The Threshold. 5

B. The Guidance Is Lawful And Reasonable. 13

II. The Remaining Factors Overwhelmingly Favor A Stay. 17

III. Even If Plaintiffs Were Entitled To Some Relief, The Preliminary Injunction Is Impermissibly Overbroad. 20

CONCLUSION 22

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

INTRODUCTION AND SUMMARY

The district court entered a legally unjustified preliminary injunction prohibiting the Department of Homeland Security (DHS) from fully implementing immigration-enforcement guidance that has successfully focused scarce resources on the most pressing threats. The injunction will have potentially severe consequences for DHS's ability to safeguard the Nation's safety. The federal government respectfully requests that this Court stay the injunction pending appeal and enter an administrative stay while it considers this motion.

This appeal involves guidance issued by the Secretary of Homeland Security to inform the "broad discretion exercised by immigration officials," which is a "principal feature" of the federal immigration system. *Arizona v. United States*, 567 U.S. 387, 396 (2012). The guidance encourages officers to prioritize enforcement action against noncitizens who pose the greatest threats to national security, public safety, and border security. And it preserves officers' discretion to enforce the immigration laws as they see fit in any given case. The district court preliminarily enjoined the guidance on the basis of plaintiffs' arguments that the guidance violates the Immigration and Nationality Act (INA) and the Administrative Procedure Act (APA).

A stay is warranted because the government is likely to prevail on appeal. At the outset, plaintiffs lack standing to sue. Moreover, the guidance is unreviewable because enforcement decisions are committed to agency discretion by law, because the guidance is not final agency action, and because plaintiffs are not within the zone

of interests of the INA provisions they seek to enforce. Even if plaintiffs could clear these threshold hurdles, their claims would fail on the merits. The INA provisions on which plaintiffs rely are not judicially enforceable mandates that eliminate the Executive's longstanding authority to exercise prosecutorial and enforcement discretion. And in embracing plaintiffs' procedural arguments, the district court disregarded DHS's reasoned explanations and policy judgment.

Leaving the injunction in place would irreparably harm the government and the public. The injunction restricts DHS's ability to focus enforcement efforts on noncitizens who pose the greatest threat to national security, border security, and public safety. Plaintiffs' sole asserted injury is that the priorities could indirectly result in the loss of an unspecified sum of money. That speculative harm does not outweigh the damage that the injunction will inflict on the United States and the public.

STATEMENT

A. Statutory Background

The INA, 8 U.S.C. § 1101 *et seq.*, establishes procedures for removing noncitizens. The process usually begins when DHS initiates a removal proceeding. *Id.* § 1229(a). That discretionary decision requires DHS to consider the enforcement priorities that Congress has charged the Secretary of Homeland Security with establishing. *E.g.*, 6 U.S.C. § 202(5). An immigration judge determines whether the noncitizen is removable and, if so, whether to enter a removal order. 8 U.S.C. § 1229a(c)(1)(A). Once a removal order is administratively final and other conditions

are met, DHS may remove the noncitizen. Section 1231 of the INA establishes a "removal period" of 90 days and provides that the noncitizen generally is subject to detention and removal during that period. *Id.* § 1231(a).

Section 1226 of the INA establishes the framework for arresting and detaining a noncitizen present in the United States "pending a decision on whether [he] is to be removed." 8 U.S.C. § 1226(a). It "distinguishes between two different categories of aliens." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) applies to all removable noncitizens and allows the government "to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 846. Section 1226(c) provides that DHS "shall take into custody any alien," 8 U.S.C. § 1226(c)(1), who "falls into one of several enumerated categories involving criminal offenses and terrorist activities." *Jennings*, 138 S. Ct. at 837. DHS "may release [such] an alien . . . only if" a specified condition not relevant here is satisfied. 8 U.S.C. § 1226(c)(2).

B. Factual Background

In September 2021, DHS adopted the enforcement guidance at issue. Guidance, R.1-1, Page ID #24-30. The guidance directs U.S. Immigration and Customs Enforcement (ICE) officers to focus their enforcement efforts on three priorities: those noncitizens who pose a threat to national security, public safety, or border security. In addition, the guidance identifies factors to help officers make individualized determinations about whether to take enforcement action against particular noncitizens. For example, the guidance avoids "bright lines or categories,"

instructing officers to consider the "individual and the totality of the facts and circumstances" to determine whether a particular noncitizen poses a public-safety threat. Guidance 3-4, R.1-1, Page ID #26-27. Similarly, the guidance directs officers to "exercise their judgment" when determining whether an individual poses a threat to border security in light of each case's facts. Guidance 4, R.1-1, Page ID #27. In all respects, "the guidance leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel." Guidance 5, R.1-1, Page ID #28. The guidance "does not compel an action to be taken or not taken." *Id.* The guidance applies only to decisions related to "apprehension and removal," Guidance 1, R.1-1, Page ID #24; it therefore does not directly apply to the separate decision about whether a noncitizen who has been arrested should be released or detained.

C. Procedural Background

Plaintiffs allege that the guidance violates certain INA provisions and the APA's requirements. On March 22, 2022, the district court entered a nationwide preliminary injunction. The government understands the injunction to prohibit relying on the guidance to: (1) decline to take custody, upon receiving advance and official notice of their release from criminal custody, of individuals who are currently in removal proceedings and whom DHS had previously determined are subject to § 1226(c); (2) decide whether to release certain detained individuals from DHS custody during the removal period; and (3) delay, continue, or stay the removal of anyone with a final order of removal who is currently in DHS custody. *See* Op. 78-79,

R.44, Page ID #1145-46. These prohibitions are inconsistent with DHS's longstanding practices. *See* Bible Decl. ¶¶ 25, 38, 44, R.49-1, Page ID #1187, 1193, 1195. The court denied the government's motion to stay the injunction pending appeal.

ARGUMENT

In determining whether to grant a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). The harm to the government and the public interest merge in cases involving the government. *Id.* at 435. Every factor strongly favors staying the preliminary injunction pending appeal.

I. The Government Is Likely To Prevail On The Merits.

A. Plaintiffs' Claims Are Barred At The Threshold.

1. The federal government is likely to prevail because plaintiffs lack standing to sue. The district court held that plaintiffs have standing because (1) the guidance may cause DHS not to detain some noncitizens who would otherwise be detained or removed; and (2) plaintiffs allege they will be required to spend some unspecified amount on "public safety," healthcare, and education as a result of that

speculated increase in noncitizens present in the plaintiff States. Op. 22-28, R.44, Page ID #1089-95. That reasoning fails at every step.

At the outset, the court gave short shrift to the principle that litigants "lack[] a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (same for "procuring enforcement of the immigration laws"). Nor has the Supreme Court or this Court ever permitted a State to end-run that principle by basing a challenge to the federal government's enforcement priorities on indirect and incidental fiscal consequences. Indeed, in light of the Framers' Constitutional design that allows the federal government to act directly upon individuals, *see New York v. United States*, 505 U.S. 144, 162-66 (1992), the federal government's actions may have incidental financial or other effects on a State's interactions with those same individuals. But the notion that such incidental effects can give rise to a legally protected interest sufficient to support a State's standing to sue the United States cannot be reconciled with the autonomy inherent in the Constitution's separate-sovereign framework. Just as "it is no part of [a State's] duty or power to enforce [its residents'] rights in respect of their relations with the Federal Government," *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), it is no part of a State's power to claim cognizable injury from the derivative and incidental effects of its residents' relations with the federal government.

Indeed, if such incidental consequences were deemed sufficient to satisfy Article III, the federal courts could be drawn into every immigration policy dispute between a State and the federal government. Plaintiffs' theory reduces to the assertion that any federal action increasing the number of noncitizens within their borders injures them; other States might use equivalent logic to claim the same thing about any action reducing their noncitizen populations, perhaps on the theory that noncitizens pay state taxes. But allowing States to assert such generalized grievances would circumvent the principle that nobody has a cognizable interest in the enforcement of laws against another and would upend the "separation-of-powers principles" that underlie Article III's case-or-controversy requirement and that serve to "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

In any event, nothing in the guidance requires a reduction in immigration enforcement, much less a reduction against those noncitizens whose presence is more likely to lead to the incidental effects the plaintiffs allege. The guidance encourages officers to prioritize those noncitizens who pose the greatest risk to safety and security. And the record confirms that such prioritization has in fact allowed DHS to focus resources against noncitizens who most pose such a risk—such as by allowing DHS to arrest substantially more noncitizens convicted of aggravated felonies, *see* Considerations Memorandum 17, R.27-2, Page ID #459, and to direct hundreds of

additional officers to the Nation's southwest border, Bible Decl. ¶ 49, R.49-1, Page ID #1198-99.

The court also suggested that, even if the guidance does not increase crime, the States would incur costs due to their voluntary decisions to place certain noncitizens on supervised release. Op. 25-26, R.44, Page ID #1092-93. But it is black-letter law that litigants cannot spend their way to standing. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020). And the court cited no evidence indicating that any such costs would not be outweighed by DHS's decision to focus enforcement on noncitizens most likely to endanger public safety.

Finally, the court suggested in passing that the guidance could force the States to devote more Medicaid and education funds to noncitizens. Op. 24-25, R.44, Page ID #1091-92. That too is speculative. Among other priorities, the guidance directs immigration officers to focus on removing noncitizens who arrived after November 2020—and has in fact enabled DHS to surge resources to the border to serve that border-security function (a result that the preliminary injunction threatens to undermine, *see* Bible Decl. ¶ 49, R.49-1, Page ID #1198-99). The court cited no evidence that the noncitizens who remain within the plaintiff States under the guidance are any more likely to use Medicaid or education funds than would the noncitizens, including recent border crossers, on whom officers are also focusing enforcement efforts under the guidance.

Plaintiffs could not prevail even if they had identified injuries sufficient to support their standing because they have failed to demonstrate that any injunction would redress those injuries. Resource limitations necessarily require DHS to prioritize enforcement efforts. *See infra* pp. 15-16, 18-20. DHS cannot enforce the INA against all noncitizens potentially described in §§ 1226(c) and 1231(a), and attempting to do so would "completely overwhelm" the agency. Bible Decl. ¶ 23, R.49-1, Page ID #1186-87. Indeed, plaintiffs have failed to show that their injuries would be redressed even by the particular injunction that the court imposed, which restricts DHS's ability "to take into custody and detain some noncitizens" that DHS has "deemed priorities for removal, including recent border crossers, individuals charged but not convicted of serious public safety offenses, and [certain] sex offenders." Bible Decl. ¶ 22, R.49-1, Page ID #1186.

2. Plaintiffs' claims are also unreviewable as a statutory matter.

a. The guidance is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Enforcement decisions are "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In the specific context of immigration, Congress has empowered the Executive to decide "whether it makes sense to pursue removal at all." *Arizona v. United States*, 567 U.S. 387, 396 (2012). The Executive may "abandon the endeavor" at "each stage" of the removal process. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

The district court concluded that §§ 1226(c) and 1231(a) eliminate this discretion by stating that the Executive "shall" take into custody or remove particular noncitizens. Op. 32-39, R.44, PageID #1099-106. But the Supreme Court has repeatedly rejected the argument that a bare statutory "shall" can overcome the Executive's "deep-rooted" enforcement and prosecutorial discretion without a "stronger indication" of congressional intent. *E.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005).

The INA evinces no such intent for §§ 1226(c) and 1231(a) to serve as judicially enforceable mandates, especially in light of resource constraints and other enforcement considerations. The "broad discretion exercised by immigration officials" is a "principal feature" of the immigration-enforcement structure established by the INA. *Arizona*, 567 U.S. at 396. Congress charged the Secretary with establishing "national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). Congress has never appropriated anywhere near sufficient funds to permit the detention and removal of every noncitizen potentially covered by those provisions. Bible Decl. ¶¶ 19-20, R.49-1, Page ID #1184-85. And accepting the district court's contrary interpretation of §§ 1226(c) and 1231(a) would mean that every Administration has been violating those provisions since their enactment in 1996.

The district court concluded that *Castle Rock* was inapposite because §§ 1226(c) and 1231(a) supply "judicially manageable" standards. Op. 36-37, R.44, Page ID

#1103-04. That is the wrong inquiry. The statutes at issue in *Castle Rock* likewise contained standards for determining to enforce (or not enforce) them. *See* 545 U.S. at 758-59. The Supreme Court nevertheless held that the statutes did not displace enforcement discretion.

b. Plaintiffs' claims are also not judicially cognizable because plaintiffs fall outside the zone of interests of §§ 1226(c) and 1231(a). That inquiry asks whether a plaintiff's "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." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Here, the INA, which provides for judicial review only at the behest of noncitizens directly affected, evinces an intent not to allow suits by third parties challenging DHS's enforcement policies. *See* 8 U.S.C. § 1252(a)(5), (b)(9). That is consistent with the general principles noted above that third parties do not have a cognizable interest in the removal of a noncitizen and that the incidental financial effects of federal enforcement decisions on plaintiffs are not judicially cognizable under the INA.

c. Finally, the federal government is likely to prevail because the guidance is not final agency action subject to APA review. The guidance does not determine legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation omitted). The guidance simply articulates priorities to guide the exercise of discretion in individual cases. It does not confer lawful presence or other legal benefits on any noncitizen, and a noncitizen may not invoke the guidance as a defense in any

enforcement action. Indeed, the guidance emphasizes that it "does not compel an action to be taken or not taken" and is "not intended to, does not, and may not be relied upon to create any right or benefit." Guidance 5-7, R.1-1, Page ID #28-30.

The district court suggested that the guidance alters noncitizens' rights because it allegedly allows immigration officers to make "custody determinations" and "non-removal decisions for reasons" that §§ 1226(c) and 1231(a) do not permit. Op. 48, R.44, Page ID #1115. That rests on the flawed premise that §§ 1226(c) and 1231(a) eliminate the Executive's enforcement discretion regarding whom to arrest or remove, even in light of resource constraints and other enforcement considerations. It also misunderstands the guidance, which confers no legal right on noncitizens and which permits officers to pursue enforcement action against any removable noncitizen in the exercise of officers' individualized discretion.

The court also emphasized that the guidance may adversely affect plaintiffs' fiscs. Op. 48-49, R.44, Page ID #1115-16. But these speculative downstream financial consequences are not the "direct and appreciable legal" consequences that finality demands. *Bennett*, 520 U.S. at 178. To the extent that they exist at all, *but see supra* pp. 5-9, they are the indirect result of case-by-case decisions made by immigration officers, the States' independent spending decisions, and the operation of other laws. And the "[p]ractical consequences" of an agency's actions "are not legal harms" for purposes of finality. *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 169 (6th Cir. 2017) (quotation omitted); *accord Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 645

(6th Cir. 2004) ("[A]dverse economic effects accompany many forms of indisputably non-final government action.").

B. The Guidance Is Lawful And Reasonable.

The federal government is also likely to prevail on the merits of plaintiffs' APA claims.

1. The district court incorrectly concluded that the revised guidance violates the INA. Op. 52, R.44, Page ID #1119. Neither § 1226(c) nor § 1231(a) contains a judicially enforceable command that eliminates DHS's enforcement discretion. Even if those statutes imposed some enforceable requirement, they would only bar the release of certain noncitizens who were taken into custody and detained "pending the outcome of removal proceedings," *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018); *see* 8 U.S.C. § 1226(a), or who are within the removal period and fall within a specific provision limiting release of certain detained noncitizens, *see* 8 U.S.C. § 1231(a)(2); Considerations Memorandum 18-19, R.27-2, Page ID #460-61. The guidance does not violate either directive. Nothing in the guidance authorizes the release of a noncitizen who falls within either group; indeed, the guidance does not apply to detention decisions at all. *See id.*; Guidance 1, R.1-1, Page ID #24. Nor does the guidance forbid immigration officers from initiating enforcement action against anyone covered by §§ 1226(c) or 1231(a).

2. The district court was also wrong to conclude that the revised guidance was arbitrary or capricious. "Judicial review under th[is] standard is deferential, and a

court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The district court concluded that DHS had not adequately considered two issues: the "recidivist risk presented by criminal aliens" and the costs that the guidance would allegedly inflict upon the States, Op. 55-61, R.44, Page ID #1122-28. But the record demonstrates that DHS examined both at length.

With respect to recidivism, DHS crafted the guidance to encourage officers to prioritize noncitizens who "pose[] a current threat to public safety, including through a meaningful risk of recidivism." Considerations Memorandum 12, R.27-2, Page ID #454. The guidance reflects DHS's determination that recidivism is best addressed by directing officers to engage in a "context-specific consideration of aggravating and mitigating factors, the seriousness of an individual's criminal record, the length of time since the offense, and evidence of rehabilitation." *Id.* The district court belittled this conclusion because it believed that DHS's approach "makes it less likely that recidivism is considered in the public safety analysis." Op. 57, R.44, Page ID #1124. But DHS indisputably considered the issue, and the court's disagreement with DHS's policy judgment does not render the guidance arbitrary or capricious.

DHS also considered the financial effects of the revised guidance on the States, as part of a pages-long discussion of the guidance's "[i]mpact on States." Considerations Memorandum 14-17, R.27-2, Page ID #456-59. DHS explained that "it is challenging" to measure the extent of that impact because the effects of the

guidance turn in part on "decisions that state and local governments" will make in response to it. Considerations Memorandum 15-16, R.27-2, Page ID #457-58. Moreover, DHS concluded that the benefits of the guidance would likely outweigh any "marginal" and "downstream" impact on the States' fiscs. *Id.* The district court deemed DHS's explanation unsatisfactory because it thought that the APA required DHS to undertake a more exhaustive study of the guidance's effect on States' criminal-justice expenditures. Op. 61, R.44, Page ID #1128. But as the Supreme Court recently reaffirmed, "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies." *Prometheus Radio Project*, 141 S. Ct. at 1160.

The district court separately concluded that DHS had failed to explain why DHS's conceded resource constraints necessitated the prioritization reflected in the guidance. Op. 62, R.44, Page ID #1129. But DHS addressed that question in depth. *See* Considerations Memorandum 5-8, 17-20, R.27-2, Page ID #447-50, 459-62. Indeed, contrary to the court's conclusory assertion that "DHS was not under such a resource crunch that it needed" to adopt the guidance, Op. 63, R.44, Page ID #1130, the record confirms that the number of pending removal proceedings has increased by over 400% since 2010; that over 3 million noncitizens are in such proceedings or have final orders of removal; that DHS has only approximately 6,500 officers and far too few trial attorneys to manage those cases; and that ICE currently has a bedspace capacity limit of fewer than 26,000 and is detaining more than 20,000 noncitizens.

Considerations Memorandum 5-8, R.27-2, Page ID #447-50; Bible Decl. ¶¶ 19-20, R.49-1, Page ID #1184-85. These data amply demonstrate that DHS's resource constraints are real.

3. Finally, the district court incorrectly ruled that the guidance is subject to the APA's notice-and-comment provisions. Op. 64-71, R.44, Page ID #1131-38. Those provisions do not apply to "general statements of policy," 5 U.S.C. § 553(b)(A), that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quotation omitted). They also do not apply to "procedural rules" of "agency organization, procedure, or practice," 5 U.S.C. § 553(b)(A), that do not alter the rights or interests of parties, *see Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014). These provisions plainly exempt the guidance from the APA's notice-and-comment requirements.

The district court's contrary conclusion depends on the mistaken premise that the guidance establishes a "binding norm" by "displacing the detention and removal standards" of the INA. Op. 67-68, R.44, Page ID #1134-35. But the guidance does not "narrowly circumscribe[] administrative discretion in all future cases" or "finally and conclusively determine[] the issues to which it relates." *Dyer v. Secretary of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989) (per curiam). The guidance takes pains to "leave[] the exercise of prosecutorial discretion to the judgment of [DHS] personnel." Guidance 3-5, R.1-1, Page ID #26-28. And although the court emphasized that officers are expected to consider the guidance when making

individualized enforcement decisions, Op. 69, R.44, Page ID #1136, internal agency expectations do not convert guidance into legislative rules. *Cf. National Mining Ass'n v. McCarthy*, 758 F.3d 243, 250-53 (D.C. Cir. 2014) (holding instructions to agency staff non-final because such instructions do not "impose legally binding obligations or prohibitions on regulated parties").

II. The Remaining Factors Overwhelmingly Favor A Stay.

The government and public will be irreparably injured if the preliminary injunction is not stayed pending appeal. These injuries outweigh the insubstantial and unquantified monetary harms that plaintiffs claim the guidance will cause. In recent years, the Supreme Court has repeatedly stayed broad injunctions against the Executive's immigration policies. *E.g.*, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (U.S. Mar. 11, 2020); *Department of Homeland Sec. v. New York*, No. 19A785 (U.S. Jan. 27, 2020); *Barr v. East Bay Sanctuary Covenant*, No. 19A230 (U.S. Sept. 11, 2019); *Trump v. Sierra Club*, No. 19A60 (U.S. July 26, 2019). This Court should do the same.

The preliminary injunction is "an improper intrusion by a federal court into the workings of a coordinate branch of the Government." *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers). The injunction usurps the Executive's constitutional and statutory authority by restricting DHS's ability to allocate scarce resources to the most serious offenders. As the Fifth Circuit emphasized in staying a similar injunction of DHS's interim guidance, "prosecutorial discretion is an indubitable and a Constitutional power" and "[t]he injury to the

executive's daily exercise of this historic discretion is irreparable in the basic sense of the word; there is no way to recover the time when its exercise of discretion is being enjoined during the pendency of the appeal." *Texas v. United States*, 14 F.4th 332, 340-41 (5th Cir.) (quotation omitted), *vacated*, 24 F.4th 407 (5th Cir. 2021).

Failing to stay the injunction could also potentially put the agency in a whipsaw. The injunction would require DHS to adopt a new interim enforcement policy and retrain thousands of officers on that policy, only to revert back to the guidance should DHS prevail on appeal. The injunction "has already presented operational challenges" for immigration officers, engendering "considerable doubt and uncertainty" about how those officers should exercise their discretion. Bible Decl. ¶ 43, R.49-1, Page ID #1195. The prudent course would be to allow DHS to exhaust appellate review before requiring a change in policy. *See Texas*, 14 F.4th at 341.

The injunction is especially pernicious because it interferes with the government's ability to implement a policy with proven results. The "implementation of the enforcement priorities" has allowed DHS to "re-deploy[] assets to meet the current threat and reality." Bible Decl. ¶ 49, R.49-1, Page ID #1198-99. For example, DHS has "re-tasked several field operations teams" and has otherwise deployed hundreds of additional officers to the southwest border, thus focusing its "resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States." *Id.* Implementing the injunction may require DHS to "realign field teams and other assets

to allocate limited time and resources on non-criminal and other lower priority targets," which would "disrupt" the agency's "ability to have a meaningful impact on important border security efforts" and would "limit resources available to detain recent border-crossers." *Id.* Similarly, the agency's prioritization efforts have enabled the agency to increase enforcement actions against the most pressing public-safety threats. For example, between February 18 and August 31, 2021, while applying the previous interim guidance, ICE arrested 6,046 individuals with aggravated felony convictions, compared to just 3,575 during the same period in 2020. Considerations Memorandum 17, R.27-2, Page ID #459.

More generally, implementing the injunction could destabilize the Nation's immigration-enforcement apparatus. For example, ICE has fewer than 26,000 "available bedspace[s]" and more than 20,000 detained noncitizens. Bible Decl. ¶ 20, R.49-1, Page ID #1185. Requiring "[e]nforcement actions against the entire population described" in the preliminary injunction "would require ICE bedspace" that "simply do[es] not exist." Bible Decl. ¶ 19, R.49-1, Page ID #1184-85. Attempting to implement the injunction would also require ICE to devote substantial additional "personnel[] and other resources" to taking enforcement actions against noncitizens who pose lesser public-safety or border-security threats, which "would detract from the agency's ability to meet other pressing operational needs." *Id.*

These harms dwarf any incidental effect of the guidance on plaintiffs. The district court's finding of irreparable harm rests on allegations of financial injury that

are insufficient even to satisfy Article III. *See supra* pp. 5-9. The notion that plaintiffs will suffer irreparable monetary losses from a temporary stay sufficient to overcome the United States' countervailing interests is without merit.

III. Even If Plaintiffs Were Entitled To Some Relief, The Preliminary Injunction Is Impermissibly Overbroad.

Even if plaintiffs were likely to succeed on some of their claims, that would not entitle them to a nationwide injunction. Such relief contravenes fundamental constitutional and equitable principles requiring that relief be tailored to redressing a plaintiff's specific injury. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) (explaining that Article III authorizes federal courts to grant relief only to remedy "the inadequacy that produced [the plaintiff's] injury"); *Califano v. Yamazaki*, 442 U.S. 682, 702 (1979) (explaining that equitable relief must "be no more burdensome . . . than necessary to provide complete relief to the plaintiffs").

Such injunctions also create legal and practical problems. They circumvent the procedural rules governing class actions, which permit relief to absent parties only if rigorous safeguards are satisfied. Fed. R. Civ. P. 23. They enable forum shopping and empower a single district judge to nullify the decisions of all other lower courts by barring application of a challenged policy in any district nationwide. *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). And they operate asymmetrically: a nationwide injunction anywhere freezes the challenged action everywhere, such that the government must prevail in every suit while any

plaintiff can derail a federal regulation nationwide with a single district-court victory. *See id.* The prospect of a single district court decision blocking government policy nationwide while the ordinary appellate process unfolds often leaves the Executive with little choice but to seek emergency relief, which deprives the judicial system of the benefits that accrue when numerous courts are able to grapple with complex legal questions. *See id.* at 600-01; *Gun Owners of Am., Inc. v. Garland*, 992 F.3dd 446, 473-74 (6th Cir.), *vacated on other grounds*, 19 F.4th 890 (6th Cir. 2021) (same). That possibility is particularly acute in this case, where a different district court has already held a bench trial on similar claims challenging the guidance brought by different plaintiff States. *See Texas v. United States*, No. 6:21-cv-16 (S.D. Tex.).

Nationwide relief is particularly inappropriate here. Plaintiffs' alleged harm is that noncitizens within their borders who are not detained or removed in light of the guidance might commit more crime and consume more State resources. But a tailored injunction limited to the plaintiff States would require DHS to detain or remove precisely those noncitizens about whom the States seem to worry, including especially those noncitizens who are being released from the States' criminal custody and who DHS has determined are subject to § 1226(c). And the district court failed to cite any piece of evidence demonstrating why such a tailored injunction would not suffice to ameliorate any claimed harms to the plaintiff States.

CONCLUSION

The government respectfully requests that this Court stay the preliminary injunction pending appeal and enter an immediate administrative stay.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

H. THOMAS BYRON III
MICHAEL SHIH
/s/ Sean R. Janda
SEAN R. JANDA
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3388

April 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,163 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sean R. Janda
SEAN R. JANDA

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sean R. Janda
SEAN R. JANDA

ADDENDUM

TABLE OF CONTENTS

District Court Docket A1

Guidance (Sept. 30, 2021) (ECF 1-1, Page ID #24-30) A12

Considerations Memorandum (Sept. 30, 2021) (ECF 27-2, Page ID #443-463) A19

District Court Opinion & Order Denying Motion to Dismiss and Granting Motion for a Preliminary Injunction (MaR.22, 2022) (ECF 44, Page ID #1068-1146) A40

Notice of Appeal (Mar. 28, 2022) (ECF 48, Page ID #1156-1157) A119

Declaration of Daniel Bible (Mar. 28, 2022) (ECF 49-1, Page ID #1178-1200) A122

APPEAL

U.S. District Court
Southern District of Ohio (Dayton)
CIVIL DOCKET FOR CASE #: 3:21-cv-00314-MJN-PBS

State of Arizona et al v Biden et al
Assigned to: Judge Michael J. Newman
Referred to Magistrate Judge Peter B Silvain, Jr
Case in other court: Sixth Circuit Court of Appeals, 22-03272
Cause: 05:702 Administrative Procedure Act

Date Filed 11/18/2021
Jury Demand: None
Nature of Suit 899 Other Statutes Administrative Procedures Act/Review or Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

State of Arizona represented by **Anthony R. Napolitano**
2005 N. Central Ave
Phoenix, AZ 85004-1592
602-542-8958
Email: Anthony.Napolitano@azag.gov
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Michael Flowers
Ohio Attorney General's Office
30 E. Broad St.
Columbus, OH 43215
614-728-7511
Email: Benjamin.Flowers@OhioAGO.gov
ATTORNEY TO BE NOTICED

Plaintiff

State of Montana represented by **Christian Brian Corrigan**
Montana Department of Justice
P O Box 201401
215 North Sanders
Helena, MT 59620 1401
406-444-2026
Email christian corrigan@mt gov
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Michael Flowers
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

State of Ohio represented by **Sylvia May Mailman**

Ohio Attorney General
615 W Superior Ave
11th Floor
Cleveland, OH 44113
614-282-3594
Fax: 855-579-2029
Email: May.Davis@ohioago.gov
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Benjamin Michael Flowers
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Joseph R. Biden represented by **Adam Kirschner**
DOJ-Civ
Poc Agostinho, Jean
1100 L St., N.W.
8142
Washington, DC 20530
202-307-0340
Email: adam.kirschner@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian C. Rosen-Shaud
DOJ-Civ
Federal Programs Branch
1100 L Street
Rm. 12022
Washington, DC 20530
202-305-7667
Email: brian.c.rosen-shaud@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F Knapp
DOJ-Civ
1100 L Street NW
Ste 12008
Washington, DC 20005
202-514-2071
Email: michael.f.knapp@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States Department of Homeland Security represented by **Adam Kirschner**
(See above for address)

A2

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian C. Rosen-Shaud
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F Knapp
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States of America represented by **Adam Kirschner**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian C. Rosen-Shaud
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F Knapp
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Alejandro Mayorkas represented by **Adam Kirschner**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian C. Rosen Shaud
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F Knapp
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Troy Miller represented by **Adam Kirschner**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian C. Rosen-Shaud
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F Knapp
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Tae Johnson represented by **Adam Kirschner**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian C. Rosen-Shaud
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F Knapp
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Ur Jaddou represented by **Adam Kirschner**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian C. Rosen-Shaud
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael F Knapp
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

David J. Carey represented by **David J. Carey**
American Civil Liberties Union of Ohio Foundation
1108 City Park Avenue
Suite 203
Columbus, OH 43206
(614) 586-1972
Fax: (614) 586-1974
Email: dcarey@acluohio.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Immigration Reform Law Institute represented by **Brian E Hurley**
Schroeder, Maundrell, Barbiere & Powers
5300 Socialville Foster Road
Suite 200
Mason, OH 45040
513-583-5242
Email: bhurley@smbplaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/18/2021	1	COMPLAINT against All Defendants (Filing fee $ 402 paid - receipt number: AOHSDC-8599591), filed by State of Ohio, State of Montana, State of Arizona. (Attachments: # 1 Exhibit A, # 2 Civil Cover Sheet, # 3 Summons Form Attorney General, # 4 Summons Form US Attorney, # 5 Summons Form Civil Process Clerk, # 6 Summons Form Biden, # 7 Summons Form Biden, # 8 Summons Form Department of Homeland Security, # 9 Summons Form Mayorkas, # 10 Summons Form Miller, # 11 Summons Form Johnson, # 12 Summons Form Jaddou) (Flowers, Benjamin) (Entered: 11/18/2021)
11/19/2021	2	Summons Issued as to All Defendants. (srb) (Entered: 11/19/2021)
11/23/2021	3	CERTIFICATE of Mailing by the Clerk: A copy of the complaint and issued summons were sent to the named defendants via certified mail. (daf) (Entered: 11/23/2021)
11/23/2021	4	MOTION for Preliminary Injunction by Plaintiffs State of Arizona, State of Montana, State of Ohio. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S) (Flowers, Benjamin) (Entered: 11/23/2021)
11/23/2021	5	NOTICE OF HEARING: An informal conference on Plaintiffs' motion for a preliminary injunction, under S.D. Ohio Civ. R. 65.1(a), is set for **11/29/2021 at 4:00 p.m. ET** before Judge Michael J. Newman by telephone. Judge Newman's courtroom deputy will provide counsel of record with call-in information. (jak) (Entered: 11/23/2021)
11/23/2021	6	NOTICE of Appearance by Adam Kirschner for Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America (Kirschner, Adam) (Entered: 11/23/2021)
11/23/2021	7	MOTION to Change Venue *to the District of Arizona* by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Attachments: # 1 Text of Proposed Order) (Kirschner, Adam) (Entered: 11/23/2021)
11/24/2021	8	MOTION for Leave to Appear Pro Hac Vice (Filing fee of $200 paid, receipt number Waived) of Sylvia May Davis by Plaintiff State of Ohio. (Attachments: # 1 Certificate of Good Standing) (Flowers, Benjamin) (Entered: 11/24/2021)
11/24/2021	9	MOTION for Leave to Appear Pro Hac Vice (Filing fee of $200 paid, receipt number AOHSDC-8608715) of Christian B. Corrigan by Plaintiff State of Ohio. (Attachments: # 1 Certificate of Good Standing) (Flowers, Benjamin) (Entered: 11/24/2021)
11/26/2021	10	RESPONSE to Motion re 7 MOTION to Change Venue *to the District of Arizona* filed by Plaintiffs State of Arizona, State of Montana, State of Ohio. (Flowers, Benjamin) (Entered: 11/26/2021)

11/29/2021		NOTATION ORDER re 9 Motion for Leave to Appear Pro Hac Vice of Christian B Corrigan is DENIED WITHOUT PREJUDICE for Counsel's failure to submit a Certificate of Good Standing from the State of Montana, as stated in its motion Counsel may re file such a motion that contains the appropriate affirmative statement of Mr. Corrigan's state of licensure to correspond with his Certificate of Good Standing Signed by Magistrate Judge Peter B. Silvain, Jr. on 11/29/2021. (del) (Entered: 11/29/2021)
11/29/2021	11	MOTION for Leave to Appear Pro Hac Vice (Filing fee of $200 paid, receipt number AOHSDC-8608715) of Christian B. Corrigan by Plaintiff State of Ohio. (Attachments: # 1 Certificate of Good Standing) (Flowers, Benjamin) (Entered: 11/29/2021)
11/29/2021	12	REPLY to Response to Motion re 7 MOTION to Change Venue *to the District of Arizona* filed by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America (Kirschner, Adam) (Entered: 11/29/2021)
11/29/2021	13	ORDER granting 11 Motion for Leave to Appear Pro Hac Vice of Christian B. Corrigan as counsel or co-counsel in this case for Plaintiff, State of Montana. Counsel is directed to register for e-filing through PACER unless they have done so previously. Signed by Judge Michael J. Newman on 11/29/2021. (bjr) (Entered: 11/29/2021)
11/30/2021	14	ORDER granting 8 Motion for Leave to Appear Pro Hac Vice of Sylvia May Davis as counsel or co counsel in this case for Plaintiff, State of Ohio Counsel is directed to register for e-filing through PACER unless they have done so previously. Signed by Judge Michael J Newman on 11/30/2021 (bjr) (Entered 11/30/2021)
11/30/2021	15	Minute entry for informal conference held under S.D. Ohio Civ. R. 65.1 before Judge Michael J. Newman on 11/29/2021. Benjamin M. Flowers and Anthony R. Napolitano appeared and participated on behalf of Plaintiffs. Adam Kirschner appeared and participated on behalf of Defendants. The Court recognized that Defendants' motion to transfer (Doc. No. 7) is ripe and has taken the matter under advisement. Defendants orally moved to stay briefing on Plaintiffs' motion for a preliminary injunction until the Court issues a decision on the motion to transfer. Should a briefing schedule on Plaintiffs' motion for a preliminary injunction be necessary, the parties agreed to the default timeline set forth in S.D. Ohio Civ. R. 7.2(a)(2). No party anticipates discovery issues, and Defendants intend to compile and promptly produce the administrative record to Plaintiffs. (Court Reporter: Julie Renee Hohenstein) (jak) (Entered: 11/30/2021)
11/30/2021	16	NOTATION ORDER granting Defendants' oral motion to stay briefing on Plaintiffs' motion for a preliminary injunction pending disposition of Defendants' motion to transfer (Doc. No. 7). Should the Court deny Defendants' motion to transfer, a simultaneous briefing schedule order shall issue IT IS SO ORDERED Signed by Judge Michael J Newman on 11/30/2021. (jak) (Entered: 11/30/2021)
12/06/2021	17	ORDER: (1) DENYING DEFENDANTS' MOTION TO TRANSFER (DOC. NO. 7); (2) LIFTING THE STAY ON BRIEFING OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION; AND (3) SETTING A BRIEFING SCHEDULE ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION. The Court **DENIES** DHS's motion to transfer. 7 The Court hereby **LIFTS** the stay on the briefing schedule for Plaintiffs' motion for a preliminary injunction. Doc. No. 16 . DHS shall file an opposition memorandum in response to Plaintiffs' preliminary injunction request on or before **December 27, 2021.** Plaintiffs shall file a reply brief 14 days from the filing of DHS's opposition memorandum.The Court intends to schedule an in-person oral argument on Plaintiffs' motion for a preliminary injunction. An order setting a status conference to discuss the date and time of oral argument will issue by separate entry. Signed by Judge Michael J. Newman on 12/6/2021. (bjr) (Entered: 12/06/2021)

12/07/2021	18	NOTICE of Appearance by Michael F Knapp for Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America (Knapp, Michael) (Entered: 12/07/2021)
12/07/2021	19	NOTICE OF HEARING: Status conference set for **12/15/21 at 4:00 p.m. ET** before Judge Michael J. Newman by telephone. Counsel shall call: 1-888-278-0296, enter access code 2725365, security code 123456, and wait for the Court to join the conference. (jak) (Entered: 12/07/2021)
12/07/2021	20	MOTION for Leave to Appear Pro Hac Vice (Filing fee of $200 paid, receipt number AOHSDC-8625714) of Anthony R. Napolitano by Plaintiff State of Ohio. (Attachments: # 1 Certificate of Good Standing) (Flowers, Benjamin) (Entered: 12/07/2021)
12/08/2021	21	NOTICE by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America *of Administrative Record* (Attachments: # 1 Exhibit AR Certification, # 2 Exhibit AR Index) (Kirschner, Adam) (Entered: 12/08/2021)
12/08/2021		NOTATION ORDER granting 20 Motion for Leave to Appear Pro Hac Vice of Anthony R. Napolitano,as Counsel or Co-Counsel in this case for Plaintiff, for the State of Arizona. Counsel is directed to register for e-filing through PACER unless they have done so previously. Signed by Magistrate Judge Michael J. Newman on 12-8-2021. (bjr) (Entered: 12/08/2021)
12/10/2021	22	NOTICE of Appearance by Brian C. Rosen-Shaud for Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America (Rosen-Shaud, Brian) (Entered: 12/10/2021)
12/14/2021	23	SUMMONS Returned Executed as to Defendant, Joseph R. Biden. Card marked Received Mail Operation. Tracking No. 7014 3490 0000 7920 1805. Joseph R. Biden served on 12/14/2021; Answer due 1/4/2022. (bjr) (Entered: 12/14/2021)
12/16/2021	24	Minute entry for status conference held on 12/15/2021 before Judge Michael J. Newman. Benjamin D. Flowers and Sylvia May Davis appeared and participated on behalf of Plaintiffs. Brian C. Rosen-Shaud and Michael F. Knapp appeared and participated on behalf of Defendants. Defendants intend to file a motion to dismiss simultaneous to their opposition memorandum in response to Plaintiffs' motion for a preliminary injunction. Upon agreement of the parties, the Court set an oral argument on Plaintiffs' motion for a preliminary injunction and Defendants' forthcoming motion to dismiss on 02/16/2022. The Court modified the briefing schedule as follows: Defendants' opposition memorandum in response to Plaintiffs' motion for a preliminary injunction and motion to dismiss is due on or before 12/27/2021; Plaintiffs shall file an omnibus opposition memorandum in response to Defendants' motion to dismiss and reply in support of their motion for a preliminary injunction 21 days thereafter; and Defendants' reply brief in support of their motion to dismiss is due 14 days from the filing of Plaintiffs' omnibus brief. (Court Reporter: Julie Renee Hohenstein) (jak) (Entered: 12/16/2021)
12/17/2021		Set/Reset Deadlines as to 4 MOTION for Preliminary Injunction. Defendants' opposition memorandum in response to Plaintiffs' motion for a preliminary injunction and motion to dismiss is due on or before **12/27/2021;** Plaintiffs shall file an omnibus opposition memorandum in response to Defendants' motion to dismiss and reply in support of their motion for a preliminary injunction 21 days thereafter; and Defendants' reply brief in support of their motion to dismiss is due 14 days from the filing of Plaintiffs' omnibus brief. (bjr) (Entered: 12/17/2021)
12/17/2021	25	NOTICE OF ORAL ARGUMENT - Upon agreement of the parties, oral argument on Plaintiffs motion for a preliminary injunction and Defendants motion to dismiss is set on

		February 16, 2022 at 10:00 a.m. ET in the Walter H. Rice Federal Building & U.S. Courthouse, Courtroom 1. Signed by Judge Michael J. Newman on 12/17/21. (pb) (Entered: 12/17/2021)
12/22/2021	26	SUMMONS Returned Executed as to 1 Complaint executed upon Merrick Garland, Attorney General, US Dept. Justice, 950 Pennsylvania Ave NW, Washington DC 20530; Tracking No. 7014 3490 0000 7920 1799. Answer due 1/29/2022. (bjr) Modified on 12/22/2021 to correct clerical error (bjr). (Entered: 12/22/2021)
12/22/2021		Set/Reset Deadlines: United States Department of Homeland Security answer due 1/31/2022. (pb) (Entered: 12/22/2021)
12/27/2021	27	ADMINISTRATIVE RECORD by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Attachments: # 1 Exhibit Corrected AR Index, # 2 Exhibit Considerations Memo, # 3 Exhibit Bernsen 1976 Memo, # 4 Exhibit Meissner 2000 Memo, # 5 Exhibit Morton 2010 Memo, # 6 Exhibit Morton 2011 Memo, # 7 Exhibit J Johnson 2014 Memo, # 8 Exhibit Kelly 2017 Memo, # 9 Exhibit Pekoske 2021 Memo, # 10 Exhibit ICE 2021 Interim Guidance, # 11 Exhibit Stakeholder Outreach Summary Memo, # 12 Exhibit ICE Listening Sessions Memo, # 13 Exhibit Outreach April 6-April 9, # 14 Exhibit Outreach April 14-May 20, # 15 Exhibit AART Data Memo, # 16 Exhibit OPLA PD Memo, # 17 Exhibit Reps Comer and Jordan Ltr, # 18 Exhibit Rep Bishop Ltr, # 19 Exhibit Ill AG Raoul Ltr, # 20 Exhibit Rep Biggs Ltr, # 21 Exhibit Fla Gov DeSantis Ltr, # 22 Exhibit Rep Fallon Ltr, # 23 Exhibit Rep Thompson Ltr, # 24 Exhibit Sen Scott Ltr, # 25 Exhibit Sheriff Rambosk Ltr, # 26 Exhibit Rep Ocasio-Cortez Ltr, # 27 Exhibit Sen Booker Ltr, # 28 Exhibit EO 13993, # 29 Exhibit Light Article, # 30 Exhibit Decker Decl, # 31 Exhibit Berg Decl, # 32 Exhibit Burke Decl) (Knapp, Michael) (Entered: 12/27/2021)
12/27/2021	28	RESPONSE in Opposition re 4 MOTION for Preliminary Injunction filed by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Knapp, Michael) (Entered: 12/27/2021)
12/27/2021	29	MOTION to Dismiss for Lack of Jurisdiction , MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , MOTION for Judgment as a Matter of Law (Responses due by 1/18/2022) by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Attachments: # 1 Text of Proposed Order) (Knapp, Michael) (Entered: 12/27/2021)
12/28/2021	30	UNOPPOSED MOTION TO FILE BRIEF AS AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF OHIO, AND ACLU OF ARIZONA (Attachments: # 1 Proposed Amici Curiae, # 2 Affidavit Declaration of David K. Hausman) (Carey, David) Modified on 12/28/2021 to correct text (pb). (Entered: 12/28/2021)
12/28/2021	31	NOTATION ORDER granting 30 motion for leave of Court to file brief as *amici curiae*. The Clerk is directed to separately file *Amici's* proposed brief ([30-1]) and affidavit ([30-2]). Should the parties wish to respond, they shall do so on or before 01/18/2022. IT IS SO ORDERED. Signed by Judge Michael J. Newman on 12/28/2021. (jak) (Entered: 12/28/2021)
12/28/2021	32	BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF OHIO, AND ACLU OF ARIZONA re 29 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM MOTION for Judgment as a Matter of Law by Amicus David J. Carey. (Attachments: # 1 Declaration of David Hausman) (pb) (Entered: 12/28/2021)

01/18/2022	33	REPLY to Response to Motion re 4 MOTION for Preliminary Injunction filed by Plaintiffs State of Arizona, State of Montana, State of Ohio. (Attachments: # 1 Exhibit T) (Flowers, Benjamin) (Entered: 01/18/2022)
01/18/2022	34	RESPONSE to Motion re 29 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM MOTION for Judgment as a Matter of Law filed by Plaintiffs State of Arizona, State of Montana, State of Ohio. (Attachments: # 1 Exhibit T) (Flowers, Benjamin) (Entered: 01/18/2022)
01/21/2022	35	Unopposed MOTION for Leave to File *Brief as Amicus Curiae of the Immigration Reform Law Institute* by Amicus Immigration Reform Law Institute. (Attachments: # 1 Amicus Curiae Brief) (Hurley, Brian) (Entered: 01/21/2022)
01/21/2022	36	NOTATION ORDER granting 35 motion for leave of Court to file brief as *amici curiae*. The Clerk is directed to separately file [35-1] *Amici's* proposed brief. Should the parties wish to respond, they shall do so on or before 02/11/2022. IT IS SO ORDERED. Signed by Judge Michael J. Newman on 01/21/2022. (jak) (Entered: 01/21/2022)
01/26/2022	37	NOTICE: The 02/16/2022 oral argument will now be held via GoToMeeting video conference software at 10:00 a.m. ET before Judge Michael J. Newman. Call-in information for interested parties, the media, or the general public is: +1 (786) 535-3211, access code: 730-143-365. Information for the GoToMeeting video conference will be supplied to counsel of record prior to the hearing. Pursuant to S.D. Ohio Civ. R. 83.2, publication or broadcast of this proceeding is PROHIBITED. (jak) (Entered: 01/26/2022)
02/01/2022	38	REPLY to Response to Motion re 29 MOTION to Dismiss for Lack of Jurisdiction MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM MOTION for Judgment as a Matter of Law filed by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Knapp, Michael) (Entered: 02/01/2022)
02/09/2022	39	MOTION to Supplement Evidence by Plaintiffs State of Arizona, State of Montana, State of Ohio. (Attachments: # 1 Exhibit U) (Flowers, Benjamin) (Entered: 02/09/2022)
02/09/2022	40	RESPONSE to Motion re 39 MOTION to Supplement Evidence filed by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Knapp, Michael) (Entered: 02/09/2022)
02/10/2022	41	NOTATION ORDER granting 39 Plaintiffs' unopposed motion to supplement evidence. [39-1] Exhibit U will be considered as appended to 4 Plaintiffs' motion for a preliminary injunction. Signed by Judge Michael J. Newman on 2/10/2022. (bjs) (Entered: 02/10/2022)
02/16/2022	42	Minute entry for oral argument on 4 motion for a preliminary injunction and 29 motion to dismiss or alternatively for judgment on the administrative record held on 02/16/2022 before Judge Michael J. Newman. Counsel for all parties appeared and participated. The Court took the motions under advisement at the conclusion of the proceeding. (Court Reporter: Julie Renee Hoenstein) (jak) (Entered: 02/16/2022)
02/23/2022	43	Transcript of Proceedings held on February 16, 2022, before Judge Michael J. Newman. Court Reporter/Transcriber Julie Hohenstein, RPR, CRR, RMR, Telephone number 937-512-1639. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. NOTICE RE: REDACTION OF TRANSCRIPTS: Within 5 business days of this filing, each party shall inform the Court, by filing a Notice of Redaction, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The

		policy is located on our website at www.ohsd.uscourts.gov (Forms - Electronic Availability of Transcripts). Please read this policy carefully. For a complete copy of a transcript, please contact the Court Reporter or the Clerk's Office.. Redaction Request due 3/16/2022. Redacted Transcript Deadline set for 3/28/2022. Release of Transcript Restriction set for 5/24/2022. (jrh) (Entered: 02/23/2022)
03/22/2022	44	ORDER: (1) DENYING DEFENDANTS MOTION TO DISMISS (DOC. NO. 29); (2) GRANTING THE STATES MOTION FOR A PRELIMINARY INJUNCTION (DOC.NO. 4); AND (3) ENJOINING ENFORCEMENT OF THE PERMANENT GUIDANCE (DOC. NO. 4 -1) AS DESCRIBED HEREIN. Signed by Judge Michael J. Newman on 3/22/22. (pb) (Entered: 03/22/2022)
03/22/2022	45	Emergency MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Knapp, Michael) (Entered: 03/22/2022)
03/22/2022	46	RESPONSE in Opposition re 45 Emergency MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, filed by Plaintiffs State of Arizona, State of Montana, State of Ohio. (Flowers, Benjamin) (Entered: 03/22/2022)
03/23/2022	47	ORDER DENYING DEFENDANT'S EMERGENCY MOTION FOR AN ADMINISTRATIVE STAY (DOC. NO. 45). Signed by Judge Michael J. Newman on 3/23/2022. (srb) (Entered: 03/23/2022)
03/28/2022	48	NOTICE OF APPEAL re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, **(ifp status requested)** by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Knapp, Michael) (Entered: 03/28/2022)
03/28/2022	49	MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Attachments: # 1 Affidavit of Daniel Bible) (Knapp, Michael) (Entered: 03/28/2022)
03/28/2022	50	MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, *(Administrative Stay)* by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Knapp, Michael) (Entered: 03/28/2022)
03/29/2022	51	ORDER FOR EXPEDITED BRIEFING - Before the Court is Defendants motion for a stay pending appeal and a renewed motion for an administrative stay of the Court's March 22, 2022 Order. Doc. Nos. 49 , 50 . The Court ORDERS that responsive briefing be submitted on or before March 30, 2022, at 12:00 p.m. A reply brief, if any, shall be filed on or before March 31, 2022, at 12:00 p.m. Signed by Judge Michael J. Newman on 3/29/22. (pb) (Entered: 03/29/2022)

03/30/2022	52	USCA Case Number 22-3272 for 48 Notice of Appeal, filed by Alejandro Mayorkas, Joseph R. Biden, Ur Jaddou, Tae Johnson, Troy Miller, United States of America, United States Department of Homeland Security. (pb) (Entered: 03/30/2022)
03/30/2022	53	RESPONSE in Opposition re 50 MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, *(Administrative St, 49 MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, filed by Plaintiffs State of Arizona, State of Montana, State of Ohio. (Flowers, Benjamin) (Entered: 03/30/2022)*
03/31/2022	54	REPLY to Response to Motion re 50 MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, *(Administrative St, 49 MOTION to Stay re 44 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Dismiss for Failure to State a Claim,, Order on Motion for Judgment as a Matter of Law,, Order on Motion for Preliminary Injunction, filed by Defendants Joseph R. Biden, Ur Jaddou, Tae Johnson, Alejandro Mayorkas, Troy Miller, United States Department of Homeland Security, United States of America. (Knapp, Michael) (Entered: 03/31/2022)*
03/31/2022	55	ORDER: (1) DENYING DEFENDANTS MOTION FOR A STAY PENDING APPEAL (DOC. NO. 49); AND (2) DENYING DEFENDANTS MOTION FOR AN ADMINISTRATIVE STAY (DOC. NO. 50). Signed by Judge Michael J. Newman on 3/31/22. (pb) (Entered: 03/31/2022)

PACER Service Center

Transaction Receipt

04/01/2022 11:57:52

PACER Login:	sean.janda.doj	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:21-cv-00314-MJN-PBS
Billable Pages:	11	**Cost:**	1.10

Exhibit A

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

Homeland Security

September 30, 2021

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

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

Ur Jaddou
Director
U.S. Citizenship and Immigration Services

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

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

Lynn Parker Dupree
Chief Privacy Officer
Privacy Office

FROM: Alejandro N. Mayorkas
Secretary

SUBJECT: Guidelines for the Enforcement of Civil Immigration Law

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

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

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

I. Foundational Principle: The Exercise of Prosecutorial Discretion

It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders. The exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition. The United States Supreme Court stated this clearly in 2012:

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

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

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

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

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

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

II. Civil Immigration Enforcement Priorities

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

A. Threat to National Security

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

B. Threat to Public Safety

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

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

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

- the gravity of the offense of conviction and the sentence imposed;
- the nature and degree of harm caused by the criminal offense;
- the sophistication of the criminal offense;
- use or threatened use of a firearm or dangerous weapon;
- a serious prior criminal record.

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

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

- time since an offense and evidence of rehabilitation;
- conviction was vacated or expunged.

The above examples of aggravating and mitigating factors are not exhaustive. The circumstances under which an offense was committed could, for example, be an aggravating or mitigating factor depending on the facts. The broader public interest is also material in determining whether to take enforcement action. For example, a categorical determination that a domestic violence offense compels apprehension and removal could make victims of domestic violence more reluctant to report the offense conduct. The specific facts of a case should be determinative.

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

The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue. The gravity of an apprehension and removal on a noncitizen's life, and potentially the life of family members and the community, warrants the dedication of investigative and evaluative effort.

C. Threat to Border Security

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

A noncitizen is a threat to border security if:

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

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

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

III. Protection of Civil Rights and Civil Liberties

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

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

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

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

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

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

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

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

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

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

A. Training

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

B. Process for Reviewing Effective Implementation

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

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

C. Data Collection

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

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

D. Case Review Process

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

VI. Implementation of the Guidance

This guidance will become effective in sixty (60) days, on November 29, 2021. Upon the effective date, this guidance will serve to rescind (1) the January 20, *2021 Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* issued by then-Acting Secretary David Pekoske, and (2) the *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* issued by Acting ICE Director Tae D. Johnson.

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

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

VII. Statement of No Private Right Conferred

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

Homeland Security

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

September 30, 2021

Introduction

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

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

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

---

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

[2] *Id.*

[3] Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021).

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

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

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

In so ruling, the Fifth Circuit emphasized the "deep-rooted tradition of enforcement discretion when it comes to decisions that occur before detention, such as who should be subject to arrest, detainers, and removal proceedings," *id.* at *6, and reaffirmed the Supreme Court's holding that law enforcement discretion extends throughout the removal process, including to the discretionary decision of whether to "abandon the endeavor." *Id.* at *4 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999)).

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

Prosecutorial and Enforcement Discretion in the Immigration Context

History of Immigration Enforcement Policies and Priorities

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

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

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

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

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

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

---

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

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

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

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

2. Misdemeanants and new immigration violators; and

3. Other immigration violations.

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

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

---

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

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

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

Resource Limitations Necessitating Enforcement Priorities

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

---

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

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

[26] *Id.* at 2.

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

Interim Civil Immigration Enforcement Policies and Priorities

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

1. **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.

---

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

2. **Border security.** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.

3. **Public safety.** Individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety.[39]

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

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

Litigation Challenging Immigration Enforcement Guidance in the Pekoske and Johnson Memoranda

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

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

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

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

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

Listening Sessions to Help Evaluate Interim Priorities and Develop Updated Guidance

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

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

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

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

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

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

Discussion of Key Considerations

Public Safety Considerations

Public safety has long been a central focus of DHS (and, previously, INS), and it has been a key feature of multiple past guidance memoranda on enforcement priorities. Under the Pekoske Memorandum, the public safety threat category includes "individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an 'aggravated felony,' as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety." The Johnson Memorandum expands that presumed priority category to apply more generally to noncitizens who pose a threat to public safety and who have been convicted of an aggravated felony, convicted of an offense involving participation with a criminal street gang, or who have certified specified ties to criminal street gangs or transnational criminal

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

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

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

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

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

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

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

Deconfliction Considerations

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

---

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

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

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

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

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

Impact on States

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

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

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

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

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

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

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

---

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

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

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

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

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

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

[50] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, available at https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.
[51] E-mail from Nora Preciado, Director, Immigrant Affairs, to Kamal Essaheb, Counselor to the Secretary, DHS (Sept. 23, 2021, 05:42) (on file with author).
[52] The Department is aware that several states purported to enter into "agreements" with the Department at the end of the previous Administration. As the Department has explained in litigation, those documents were void ab initio and unenforceable. Any reliance on those documents is therefore unreasonable. To the extent those documents were ever valid, the Department has since terminated them.

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

Resource Considerations

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

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

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

Relationship Between Enforcement Priorities and Statutory Mandates

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

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

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

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

noncitizen who is subject to the custody provisions of 8 U.S.C. § 1226(c)(1), that noncitizen generally must remain in custody during the pendency of removal proceedings unless otherwise eligible for release pursuant to § 1226(c)(2), or as required to comply with a court order. Likewise, all noncitizens in ICE custody who are subject to the mandatory custody provisions of 8 U.S.C.§ 1231(a)(2)—those who have been found inadmissible under 8 U.S.C. § 1182(a)(2) or 1182(a)(3)(B) or deportable under § 1227(a)(2) or 1227(a)(4)(B)—must remain detained for the duration of the removal period unless release is required to comply with a court order. The Department's updated *Guidelines for the Enforcement of Civil Immigration Law* are fully consistent with these constraints and do not purport to override them.

Consideration of Alternative Approaches

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

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

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

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

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STATE OF ARIZONA, *et al.*,

Plaintiffs,

Case No. 3:21-cv-314

vs.

JOSEPH R. BIDEN, *et al.*,

Defendants.

District Judge Michael J. Newman
Magistrate Judge Peter B. Silvain, Jr.

ORDER: (1) DENYING DEFENDANTS' MOTION TO DISMISS (DOC. NO. 29); (2) GRANTING THE STATES' MOTION FOR A PRELIMINARY INJUNCTION (DOC. NO. 4); AND (3) ENJOINING ENFORCEMENT OF THE PERMANENT GUIDANCE (DOC. NO. 4-1) AS DESCRIBED HEREIN

Plaintiffs, the States of Arizona, Montana, and Ohio (collectively, the "States"), bring this action to prevent the Department of Homeland Security ("DHS")[1] from implementing civil immigration enforcement guidance they say is unlawful. Doc. Nos. 1, 1-1. Two motions are now before the Court: The States' motion for a preliminary injunction and DHS's motion to dismiss or, alternatively, for judgment on the pleadings. Doc. Nos. 4, 29. Both motions are fully briefed, and the Court heard oral argument from the parties on February 16, 2022. Doc. No. 42. The motions are now ripe for review.

The Constitution vests "the executive Power" in the President of the United States. U.S. Const. art. II, § 1, cl. 1. Inherent in that executive power is the President's "vast share of responsibility for the conduct of our foreign relations." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). This includes significant authority over immigration, *U.S. ex rel.*

[1] For ease of reference, the Court will collectively refer to Defendants as DHS.

Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950), and discretion to exclude unlawfully present individuals from the country, *see Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 483 (1999) ("At each stage [of the removal process] the Executive has discretion to abandon the endeavor"). At times that discretion is near plenary. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials").

But Congress, too, has "broad power over naturalization and immigration." *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)). Congress exercised that authority by establishing procedures for DHS to follow when removing unlawfully present individuals from the United States. *See, e.g.*, 8 U.S.C. § 1227 (setting forth "classes of deportable aliens"); 8 U.S.C. § 1229a (describing how removal proceedings must be conducted).[2] Sometimes Congress's instructions are permissive (DHS "may" take a certain action). But, at other points, Congress has mandated DHS "shall" take specific steps to carry out removals. *See* 8 U.S.C. §§ 1226(c)(1) (DHS "shall take into custody" noncitizens with certain criminal convictions) and 1231(a)(1)(A) (DHS "shall remove" within 90 days noncitizens with final orders of removal).

The States sue because they believe DHS skirted Congress's immigration enforcement mandates when it issued a policy that prioritizes certain high-risk noncitizens for apprehension and removal. DHS contends that seemingly mandatory statutes must be read flexibly to permit efficient law enforcement. At bottom, that is what this dispute is about: can the Executive displace clear congressional command in the name of resource allocation and enforcement goals? Here, the answer is no. *See, e.g.*, *Util. Air Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014) ("Under our system

[2] The Court uses "noncitizen" to refer to persons "not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them" (quoting U.S. Const., art. II, § 3) (citing *Medellín v. Texas*, 552 U.S. 491, 526–27 (2008))); *Youngstown*, 343 U.S. at 587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"). For that reason, and those given below, the Court will preliminarily enjoin application of DHS's immigration enforcement policy.

I. Background

DHS spent 2021 revising its approach to civil immigration enforcement. Doc. Nos. 4-1, 27-9, 27-10. Action came in the form of three guidance documents that instruct DHS officers on how to exercise their immigration enforcement authority. Doc. Nos. 4-1, 27-9, 27-10; *see also* Doc. No. 27-2 (summarizing steps taken by DHS to craft and issue immigration enforcement guidance). The States seek to block the third iteration of the guidance—DHS Secretary Alejandro N. Mayorkas's September 30, 2021 Guidelines for the Enforcement of Civil Immigration Law (the "Permanent Guidance"). Doc. No. 1 at PageID 15–22; Doc. No. 4; Doc. No. 4-1. An overview of the statutory framework governing enforcement and removal, as well as the administrative process that produced the Permanent Guidance, follows.

A. Statutory History

In the 1990s, Congress lost confidence in the ability of the Immigration and Naturalization Service ("INS"), later DHS, to "deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518 (first citing *Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs*, 103d Cong., 1st Sess. (1993); and then citing S. Rep. No. 104–48, p. 1 (1995)). The Senate Committee of Governmental Affairs declared in 1995 that "America's immigration system [was] in disarray and

criminal aliens . . . constitute a vexing part of the problem." S. Rep. No. 104-48, at 1; *see also* S. Rep. No. 104-249, at 3 (1996).

Criminal alien abscondment prior to removal was one of Congress's main concerns. A Senate report lamented, "[d]espite previous efforts in Congress to require detention of criminal aliens while deportation hearings are pending, many who should be detained are released on bond." S. Rep. No. 104-48, at 2. Before 1996, "[t]he Attorney General . . . 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." *Demore*, 538 U.S. at 519 (citing 8 U.S.C. § 1252(a)). Congress was concerned with this procedure because "[u]ndetained criminal aliens with deportation orders often abscond upon receiving a final notification from the INS that requires them to voluntarily report for removal." S. Rep. No. 104-48, at 2. Indeed, this shifted a "heav[y] burden[]" to the states, forcing them to expend "scarce criminal justice resources" to apprehend, prosecute, incarcerate, and supervise criminal aliens. *Id.* at 6, 9. Congress thought the burden could "be lessened if the INS detained more criminal aliens." *Id.* at 4.

Congress also wanted to see expeditious removals. *See* S. Rep. 104-249, at 7 ("Aliens who violate U.S. immigration law should be removed from this country as soon as possible"); S. Rep. 104-48, at 23–24. Criminal aliens posed significant costs to the states and federal government when they were not quickly removed. *See, e.g.*, S. Rep. 104-48, at 9–10 (noting the increasing costs of illegal immigration to the states due to the low level of deportations); H.R. Rep. 104-469, at 160 (stating that when noncitizens are not removed, "the resources expended to identify, apprehend, and provide a hearing to a deportable alien are all too often wasted"). Particularly, deportable noncitizens were more likely to be arrested if not detained and not quickly removed.

See Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 101st Cong., 1st Sess., 54, 52 (1989).

Two concerns animated Congress's eventual action: (1) criminal aliens' high abscondment rates; and (2) the significant cost criminal alien recidivism imposed on the states and federal government. *See* S. Rep. No. 104-48, at 7–10, 21–30; *Demore*, 538 U.S. at 518–20; *Zadvydas v. Davis*, 533 U.S. 678, 713–15 (2001) (Kennedy, J., dissenting). This led to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") and the two statutory provisions relevant in this case. Pub. L. 104-208, 110 Stat. 3009 (1996).

One—8 U.S.C. § 1226(c)—concerns the mandatory detention of "a subset of deportable criminal aliens pending a determination of their removability." *Demore*, 538 U.S. at 522. 8 U.S.C. § 1226(c) works in tandem with § 1226(a). Subsection (a)—entitled "Arrest, detention, and release"—provides that

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on-- [bond or conditional parole]

8 U.S.C. § 1226(a). Subsection (c), however, renders "criminal aliens" ineligible[3] for release pending removal proceedings:

> **(c) Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General shall take into custody any alien who--

[3] Absent application of a limited exception for release to assist a law enforcement investigation. 8 U.S.C. § 1226(c)(2).

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> 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.

The offenses cross-referenced in § 1226(c)(1)(A)–(C) generally refer to crimes of "moral turpitude," aggravated felonies, controlled substance distribution, and multiple felony convictions. 8 U.S.C. §§ 1226(c)(1)(A)–(C). Subsection (D) covers noncitizens suspected or conviction of "terrorist activities." 8 U.S.C. § 1226(c)(1)(D).

Section 1231 deals with the custodial status of noncitizens before their removal. Generally, "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A).

> During the removal period [*i.e.*, the 90-day period after which the removal order became final], the Attorney General shall detain the alien. 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.

8 U.S.C. 1231(a)(2). Both 8 U.S.C. §§ 1226 and 1231 fit into a broader noncitizen removal ecosystem.

B. Immigration Enforcement Framework

Congress charged DHS with implementing the Immigration and Nationality Act ("INA") and IIRIRA provisions governing the removal of noncitizens. 8 U.S.C. §§ 1221–32; *see also* 6 U.S.C. § 251 (vesting the authority to administer the "Border Patrol program" and the "detention and removal program" in the DHS Secretary). "The usual removal process," *Dep't of Homeland Sec. v. Thuraissigiam*, --- U.S. ---, 140 S. Ct. 1959, 1964 (2020), begins with service of a Notice to Appear on a noncitizen, a charging document setting forth the basis for removability. 8 U.S.C. § 1229(a) (explaining the requirements for a valid Notice to Appear); 8 C.F.R. § 239.1(a) (identifying who may issue a Notice to Appear); 8 C.F.R. § 1003.13 ("Charging document means the written instrument which initiates a proceeding before an Immigration Judge. . . . For proceedings initiated after April 1, 1997, these documents include a Notice to Appear").[4] A noncitizen "may be charged with any applicable ground of inadmissibility under [8 U.S.C. § 1182(a)] . . . or any applicable ground of deportability under [8 U.S.C. § 1127(a)]." 8 U.S.C. § 1229a(a)(2). An immigration judge decides whether the noncitizen is removable, 8 U.S.C. § 1229a(a), and, if so, may issue a removal order, 8 C.F.R. § 1240.12(c). The noncitizen can appeal the removal order to the Board of Immigration Appeals ("BIA"), thereby staying execution of the removal order. 8 C.F.R. § 1240.15 ("[A]n appeal shall lie from a decision of an immigration judge to the [BIA]"); 8 C.F.R. § 1003.6 ("[T]he decision in any proceeding under this chapter from which an appeal to the [BIA] may be taken shall not be executed during the time allowed for the filing of an appeal"). *See generally* 8 C.F.R. § 1003.1 (describing the BIA).[5] An unfavorable BIA decision may be appealed to a federal court of appeals. 8 U.S.C. § 1252(a)(5); *see also* 8 U.S.C.

[4] Congress did provide for expedited removal in certain circumstances not relevant here. 8 U.S.C. § 1187(b)(2); 8 U.S.C. § 1225(b)(1); 8 U.S.C. § 1228(b); 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 1208.16(e).

[5] Alternatively, the noncitizen could file a motion to reconsider or reopen the removal proceedings before the immigration judge. *See* 8 U.S.C. §§ 1229a(c)(6) and (7).

§ 1252(b)(3)(B) ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise"). A removal order becomes final upon the latest of (1) "[t]he date the order of removal becomes administratively final"; (2) "[i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order"; and (3) "[i]f the alien is detained or confined" outside the immigration process, the date of the alien's release. 8 U.S.C. § 1231(a)(1)(B). Absent a stay, the noncitizen is subject to deportation. 8 U.S.C. § 1231(a)(1)(A) (providing that "when an alien is ordered removed, the [Secretary] shall remove the alien from the United States within a period of 90 days").

Immigration and Customs Enforcement ("ICE") and its Enforcement and Removal Operations ("ERO") staff use the detainer system to apprehend noncitizens in state or local custody. 8 C.F.R. § 287.7(a) ("A detainer serves to advise another law enforcement agency that [DHS] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien"). A detainer may only issue if the ICE officer finds probable cause that the noncitizen is removable. *See* U.S. Immigration & Customs Enforcement, *Issuance of Immigration Detainers by ICE Immigration Officers* 2 (Apr. 2, 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf ("ICE Detainer Policy"). The detainer asks the state or local authority to either (1) inform ICE of the noncitizen's release date; or (2) hold the noncitizen for up to 48 hours following the noncitizen's release until ICE can take custody. 8 C.F.R. §§ 287.7(a), (d).[6] Detainers must be accompanied by an arrest warrant issued under 8 U.S.C. § 1226 or § 1231. A Notice to Appear typically issues after ICE

[6] If ICE cannot take custody of the noncitizen 48 hours after their state or local custodial term ends, the ICE officer is instructed to cancel the detainer. *See* ICE Detainer Policy, at 3.

takes custody of the noncitizen. *See, e.g.*, *Texas v. United States*, 14 F.4th 332, 337 (5th Cir. 2021), *vacated on reh'g en banc*, No. 21-40618 (5th Cir. Nov. 30, 2021).

"Section 1226 generally governs the process of arresting and detaining that group of aliens pending their removal." *Jennings v. Rodriguez*, --- U.S. ---, 138 S. Ct. 830, 837 (2018) (citing 8 U.S.C. § 1226). Generally, "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). Noncitizens may be released on bond at the DHS Secretary's discretion "[e]xcept as provided in subsection (c)." 8 U.S.C. § 1226(a). Section 1226(c) provides that "'the [Secretary] shall take into custody any alien' who falls into one of several enumerated categories involving criminal offenses and terrorist activities." *Jennings*, 138 S. Ct. at 837 (quoting 8 U.S.C. § 1226(c)(1)). Noncitizens in custody under § 1226(c) may be released "only if the [Secretary] decides . . . that release of the alien from custody is necessary" for witness-protection purposes and "the alien satisfies the [Secretary] 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.* (quoting 8 U.S.C. § 1226(c)(2)). Section 1226 governs noncitizen detention until a deportation order becomes final and the removal period begins. *See, e.g.*, *Johnson v. Guzman Chavez*, --- U.S. ---, 141 S. Ct. 2271, 2284 (2021).

Criminal aliens detained under § 1226(c) can challenge their detention before an immigration judge in a so-called *Joseph* hearing. *See Jennings*, 138 S. Ct. at 838 n.1. Review, however, is limited. *See id.* ("At a *Joseph* hearing, that person 'may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [Government] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention'" (quoting *Demore*, 538 U.S. at 514 n.3)).

Noncitizen custody and removal are governed by 8 U.S.C. § 1231 once a removal order becomes final. Section § 1231(a) provides that "the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). Detention is mandatory during the removal period. 8 U.S.C. § 1231(a)(2). But several circumstances may prolong the removal period. *See, e.g.*, *Guzman Chavez*, 141 S. Ct. at 2281. "The removal period shall be extended" beyond the initial 90-days if the noncitizen "fails or refuses" to obtain travel documents or otherwise frustrates their removal. 8 U.S.C. § 1231(a)(1)(C). Noncitizens remaining in the United States beyond the 90-day removal period may be released subject to supervision requirements. 8 U.S.C. § 1231(a)(3).[7]

C. DHS Shifts Its Immigration Enforcement Priorities

DHS asserts that Congress endowed the agency with significant discretion to determine when, how, and whether to pursue removal. Doc. No. 27-2 at PageID 444–47; Doc. No. 29 at PageID 709. The Permanent Guidance now under challenge is DHS's effort to calibrate its officers' exercise of that discretion. Doc. No. 4-1 at PageID 99–100; Doc. No. 27-2 at PageID 450–51. The States believe DHS overstates the extent of its discretion because 8 U.S.C. §§ 1226(c) and 1231 impose a mandatory duty on DHS to detain certain noncitizens and timely deport those with final removal orders. Doc. No. 4 at PageID 76–78. Their view is that the Permanent Guidance neglects these commands and arbitrarily disregards the harms of nonenforcement. *Id.* at PageID 76–83. An examination of DHS's decision making—and the several other lawsuits aimed at it—is therefore necessary.

[7] A "post-removal period" beings when, under 8 U.S.C. § 1231(a)(6), the noncitizen is detained beyond the 90-day period or released under supervision if the noncitizen is "(1) inadmissible, (2) removable as a result of violations of status requirements, entry conditions, or the criminal law, or for national security or foreign policy reasons, or (3) a risk to the community or unlikely to comply with the removal order." *Guzman Chavez*, 141 S. Ct. at 2281 (citing 8 U.S.C. § 1231(a)(6)).

1. January 20 Memo

On January 20, 2021, DHS Acting Secretary David Pekoske issued a department-wide memorandum entitled, "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" (the "January 20 Memo"). Doc. No. 27-9. Section A ordered DHS's chief of staff to "coordinate a Department-wide review of policies and practices concerning immigration enforcement." *Id.* at PageID 508. Section B instructed staff to focus their civil immigration enforcement efforts on noncitizens who present a threat to national or border security or public safety. *Id.* at PageID 508–09. Section C announced a 100-day pause on all removals of noncitizens with a final order of deportation. *Id.* at PageID 509–10. The January 20 memo applied not only

> to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including: whom to stop, question, and arrest; whom to detain and release; whether to settle, dismiss, or appeal, or join in a motion on a case; and whether to grant deferred action or parole.

Id. at PageID 508. In short, DHS intended these principles to apply to all decisions ERO officials make.

A challenge to the January 20 Memo arose in short order. Arizona and Montana sued DHS in the District of Arizona to block its enforcement. Complaint, *Arizona et al. v. U.S. Dep't of Homeland Sec. et al.*, No. 2:21-cv-186 (D. Ariz. Feb. 3, 2021), *appeal pending*, No. 21-16118 (9th Cir.). Texas, however, beat them to the punch and secured an injunction of the 100-day pause in the Southern District of Texas. *Texas v. United States*, 515 F. Supp. 3d 627, 631 (S.D. Tex. 2021). DHS did not appeal the injunction. Doc. No. 27-10 at PageID 514.

2. Interim Guidance

Acting ICE Director Tae D. Johnson issued updated guidance to ICE staff on February 18, 2021 ("Interim Guidance"). Doc. No. 27-10. Noncitizens who presented national or border

security or public safety threats were now presumed to be removable. *Id.* at PageID 515–16. Acting Director Johnson provided certain criteria for ICE staff to evaluate whether a noncitizen posed a risk to public safety, such as the "extensiveness, seriousness, and recency of the criminal activity" and mitigating factors like "personal and family circumstances" and "ties to the community." *Id.* at PageID 516. The Interim Guidance clarified that no prior approval was necessary for presumed enforcement or removal cases but was required for all other noncitizens. *Id.* at PageID 516–17. Acting Director Johnson noted the Interim Guidance would control until the DHS Secretary issued permanent enforcement guidelines. *Id.* at PageID 511. Like the January 20 Memo, the Interim Guidance was to guide all ERO decisions made throughout the enforcement process. *Id.* at PageID 512 ("[The Interim Guidance] applies to all [ICE] Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning").

Arizona and Montana folded the Interim Guidance into their lawsuit. *Arizona*, No. 2:21-cv-186, Doc. Nos. 12, 13. But the district court denied the States' motion for a preliminary injunction upon concluding the Interim Guidance was not subject to judicial review under the APA. *Arizona v. Dep't of Homeland Sec.*, No. 21-cv-00186, 2021 WL 2787930, at *11 (D. Ariz. June 30, 2021). Arizona and Montana's Ninth Circuit appeal remains pending. Notice of Appeal, *Arizona*, No. 2:21-cv-186, Doc. No. 92 (D. Ariz. June 30, 2021).[8]

Texas, again, prevailed where Arizona and Montana did not. The Southern District of Texas enjoined the Interim Guidance on September 15, 2021. *Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 3683913, at *2 (S.D. Tex. Sept. 15, 2021). After the district court clarified the

[8] DHS argued in its motion to transfer this case to the District of Arizona that Arizona and Montana were simultaneously challenging the same policy in two different circuits. Doc. No. 7 at PageID 371–72. This Court disagreed, in part because the order on appeal in the Ninth Circuit concerns the Interim Guidance. Doc. No. 17 at PageID 406–07.

scope of its injunction, the Fifth Circuit stayed the injunction in part. *Texas*, 14 F.4th at 341–42. The *en banc* court however vacated the panel decision and granted review. *Texas et al. v. United States et al.*, No. 21-40618 (5th Cir. Nov. 30, 2021). The Fifth Circuit has since granted DHS's motion for voluntary dismissal of the appeal. *Texas*, No. 21-40618 (5th Cir. Feb. 11, 2022).[9]

3. Permanent Guidance

The September 30, 2021 Permanent Guidance retained the Interim Guidance's priority categories ((1) public safety and (2) border and (3) national security threats) but introduced two key differences. *Compare* Doc. No. 4-1, *with* Doc. No. 27-10. First, it expanded the aggravating and mitigating factors ERO officers must weigh when assessing whether a noncitizen poses a public safety risk. Doc. No. 4-1 at PageID 100–01. Officers are instructed to evaluate the gravity of the noncitizen's criminal offense and sentence imposed; the harm caused; the sophistication of the crime; whether a firearm or dangerous weapon was used; and whether the noncitizen has a "serious" criminal record. *Id.* at PageID 100. Officers also must weigh certain mitigating factors before commencing enforcement proceedings, such as: age; length of presence in the United States; the noncitizen's mental or physical health; status as a victim of, or witness to, a crime; the impact deportation would have on the noncitizen's family; military service; evidence of rehabilitation; or expungement. *Id.* at PageID 100–01. These "factors are not exhaustive." *Id.* at PageID 101. The Permanent Guidance instructs enforcement agents to "evaluate the individual and the totality of the facts and circumstances" leaving "the exercise of prosecutorial discretion to [their] judgment." *Id.* at PageID 101, 102. Like the January 20 Memo and Interim Guidance, the Permanent Guidance anticipates these factors to influence ERO decisions throughout the

[9] Before the district court, Texas and Louisiana amended their complaint to incorporate the Permanent Guidance. Amended Complaint, *Texas et al.*, No. 6:21-cv-16, Doc. No. 109 (S.D. Tex. Oct. 22, 2021). A bench trial concerning the Permanent Guidance was held on February 22 and 23, 2022.

"apprehension and removal" process. *Id.* at PageID 100. ERO staff are admonished to not "rely on the fact of conviction . . . alone" when making enforcement decisions. *Id.* at PageID 101.

Noncitizens are no longer presumed to be an enforcement or removal priority if they meet the Permanent Guidance's criteria. *Id.* at PageID 100–01. Nor is preapproval necessary before ERO personnel institute enforcement or removal proceedings against a noncitizen who does not meet a priority category. *Compare id.*, *with* Doc. No. 27-10 at PageID 516–17. Upon the Permanent Guidance's November 29, 2021 effective date, DHS withdrew the January 20 Memo and Interim Guidance. Doc. No. 4-1 at PageID 103.

DHS largely structured the Permanent Guidance in response to the Southern District of Texas's order enjoining enforcement of the Interim Guidance. *Texas*, 2021 WL 3683913, at *64. The Texas district court, in part, blocked the Interim Guidance after finding DHS failed to consider important factors like criminal alien recidivism, *id.* at *47, and costs to the states, *id.* at *48–49, and overstated its purported resources constraints, *id.* at *48, in devising the policy. All told, the Texas district court believed DHS failed to "rationally explain and connect the basis for the [Interim] Guidance." *Id.* at *51 (cleaned up).

DHS sought to address each deficiency through a memorandum issued alongside the Permanent Guidance (the "Considerations Memo"). Doc. No. 27-2 at PageID 454 ("The updated guidance addresses the district court's concern [of recidivism] by calling for a context-specific consideration of aggravating and mitigating factors, the seriousness of an individual's criminal record, the length of time since the offense, and evidence of rehabilitation"). It first laid out the resources constraints that plague the agency. *Id.* at PageID 447–50. According to DHS, while removal proceedings have increased by 400% from 2010 to 2011, case completion rates have

remained flat. *Id.* at PageID 448. Same with its detention capacity. *Id.* DHS claimed that it can detain only about 1% of noncitizens in removal proceedings or subject to removal orders. *Id.*

DHS thinks that prioritization schemes lead to optimal resource allocation. *Id.* at PageID 459. For example, between February and August 2021, DHS arrested 6,046 noncitizens convicted of aggravated felonies compared to just 3,575 during the same period in 2020. *Id.* This efficiency, DHS explained, allowed it to surge more resources to the southwest border. *Id.*

DHS still believes that a totality of the circumstances assessment is appropriate to determine whether a noncitizen presents a public safety risk. *Id.* at PageID 455. Citing a study finding no relationship between an increase in immigration and crime, DHS dismissed the Texas district court's finding that it is "well [] established" that criminal aliens pose a high recidivism risk. *Id.* (quoting *Texas*, 2021 WL 3683913, at *47); *see also* Doc. No. 27-29. DHS explained that it wants its officers to be free to weigh a variety of circumstances to determine whether a noncitizen truly presents a public safety risk. Doc. No. 27-2 at PageID 459.

The Considerations Memo also addressed the Permanent Guidance's possible impact on states. *Id.* at PageID 456. DHS found downstream effects of illegal immigration on states and localities "extremely difficult to quantify" due to the countless factors at play. *Id.* at PageID 456–58. While it acknowledged that "second-order effects . . . clearly occur," it found that any negative financial impact on state and local governments to be insignificant. *Id.* at PageID 457. DHS believes its "long history" of shifting enforcement policies taught states and localities not to rely too heavily on one enforcement regime over another. *Id.* at PageID 458. Marginal fiscal effects aside, DHS contends that prioritization schemes produce more benefits than costs. *Id.*

D. Procedural History

The States seeks a preliminary injunction of the Permanent Guidance for three reasons: (1) the policy is contrary to 8 U.S.C. §§ 1226(c)(1) and 1231(a)(1)(A); (2) DHS's decision was

arbitrary and capricious, 5 U.S.C. § 706(2)(A); and (3) DHS violated the APA by not engaging in notice-and-comment rule making, 5 U.S.C. § 553. Doc. No. 4. Two more claims round out their complaint: (1) the Permanent Guidance is pretextual agency action to remedy the allegedly deficient January 20 Memo and Interim Guidance, 5 U.S.C. § 706(2)(A); and (2) the policy violates Article II's Take Care Clause, U.S. Const. art. II, § 3. Doc. No. 1. The States only seek a preliminary injunction based on Claims I–III. Doc. No. 4.

DHS's motion to dismiss and opposition to the motion for a preliminary injunction contend several threshold barriers blunt the States' challenges. Doc. No. 29. It asserts that the judicial review of the Permanent Guidance is prohibited because (1) it was a product of the agency's discretion; (2) it does not constitute "final agency action"; and (3) Congress explicitly precludes challenges to DHS's policies unrelated to enforcement and removal proceedings. Doc. No. 29 at PageID 709–20. Even if the States did secure APA review, DHS contends they lack standing to assert their claims. *Id.* at PageID 704–09. DHS alternatively seeks judgment on the administrative record, urging that its actions were consistent with the relevant statutes, reasonable, and that the Permanent Guidance was exempt from notice-and-comment. *Id.* at PageID 720–32.

The Court will address the motions in turn.

II. Legal Standards

DHS makes both a facial and factual attack on the Court's subject matter jurisdiction to hear this case. Doc. No. 29 at PageID 702–03; *see McCormick v. Miami Univ.*, 693 F.3d 654, 658 (6th Cir. 2012) ("Challenges to subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) are categorized as either a facial attack or a factual attack"). "A facial attack on the subject-matter jurisdiction questions merely the sufficiency of the pleading." *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (quoting *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1995)). The Court accepts the allegations in

the complaint as true against a facial attack. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012).

A factual attack requires the court to "weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction." *Id.* (citations omitted). The Court does not presume the veracity of the complaint against a factual attack. *Global Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015). The burden to prove subject matter jurisdiction remains with the party asserting it. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1045 (6th Cir. 2015).

To survive a Rule 12(b)(6) motion, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A complaint need not have "detailed factual allegations, but the complaint must contain more than conclusions and an unsubstantiated recitation of the necessary elements of a claim." *McCormick*, 693 F.3d at 658 (citing *Twombly*, 550 U.S. at 555). The Court assumes the "veracity of well-pleaded factual allegations and determine whether the plaintiff is entitled to legal relief as a matter of law." *Id.* (citing *Iqbal*, 556 U.S. at 679).

The Court must balance the following factors before issuing a preliminary injunction:

> (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

City of Pontiac Retired Emps. Ass'n v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014) (*en banc*) (citations omitted). "These factors are not prerequisites, but are factors that are to be balanced against each other." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021) (quoting *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir.

2002)). "In addition to demonstrating a likelihood of success on the substantive claims, a plaintiff must also show a likelihood of success of establishing jurisdiction." *Id.* (quoting *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018)).

III. Jurisdiction and Judicial Review

A. Standing

"Article III's restriction of the judicial power to Cases and Controversies is properly understood to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Uzuegbunam v. Preczewski*, --- U.S. ---, 141 S. Ct. 792, 798 (2021) (quotation marks omitted) (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000)). Thus, "to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *Dep't of Com. v. New York*, --- U.S. ---, 139 S. Ct. 2551, 2565 (2019). "To have standing, a plaintiff must allege (1) an injury in fact (2) that's traceable to the defendant's conduct and (3) that the courts can redress." *Gerber v. Herskovitz*, 14 F.4th 500, 505 (6th Cir. 2021) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992)).

"Each plaintiff has the burden 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 457 (6th Cir. 2017) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Yet if one plaintiff has standing, then the Court "need not consider whether the other [plaintiffs] . . . [have] standing to maintain the suit." *Mays v. LaRose*, 951 F.3d 775, 782 (6th Cir. 2020) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977)). Standing "cannot be 'inferred argumentatively from averments in the pleadings.'" *Crawford*, 868 F.3d at 457 (quoting *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 231 (1990)). "[R]ather, [it] 'must affirmatively appear in the record.'" *FW/PBS*, 493 U.S. at 231 (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 392 (1884)).

As explained below, the States have standing to challenge the Permanent Guidance. First, the States are entitled to special solicitude in the standing analysis. The APA affords them a chance to vindicate their quasi-sovereign interest in effective immigration enforcement. Second, the States allege a concrete, particularized monetary injury in the form of increased expenditures on noncitizens. Third, the States show these costs are fairly traceable to the Permanent Guidance because it will lead to more otherwise detainable or removable noncitizens within their borders. Finally, the States prove redressability because DHS may reconsider the Permanent Guidance if the Court enjoins it.

1. Special Solicitude

The States are entitled to "special solicitude" in the Court's standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). In *Massachusetts*, the Supreme Court recognized special solicitude turns on two factors: (1) whether Congress provided the state with a procedural right to relief and (2) whether the state seeks to vindicate its "quasi-sovereign interest[]." *Id.* ("Given [the right to challenge agency rule-making] and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis"); *see also Kentucky v. Biden*, 23 F.4th 585, 598 (6th Cir. 2022) ("As our Court, other circuits, and the Supreme Court have all recognized, states have a variety of sovereign and quasi-sovereign interests that they validly may seek to vindicate in litigation"). If a party meets both factors and is entitled to special solicitude, then they have standing "without meeting all the normal standards for redressability and immediacy." *Massachusetts*, 549 U.S. at 517–18 (quoting *Lujan*, 504 U.S. at 572 n.7). Special solicitude is apt when states have relinquished their "sovereign prerogatives" to the federal government to regulate certain conduct. *Id.* at 519; *cf. Arizona*, 567 U.S. at 397 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States").

"Quasi-sovereign interests" include "public or governmental interests that concern the state as a whole." *Massachusetts*, 549 U.S. at 520 n.17 (2007) (quoting R. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 289 (5th ed. 2003); and citing *Missouri v. Illinois*, 180 U.S. 208, 240–41 (1901)). However, a state "still must show that it suffers an 'actual or imminent' invasion of a judicially cognizable interest" to have standing. *Saginaw Cnty. v. STAT Emergency Med. Servs., Inc.*, 946 F.3d 951, 957 (6th Cir. 2020) (quoting *Massachusetts*, 549 U.S. at 517). A state "likely ha[s] standing to contest" conduct that affects their independent sovereign or quasi-sovereign interests. *Kentucky*, 23 F.4th at 601.

Sovereign interests might be at stake when a federal law threatens to preempt state law. *Id.* at 598 (first citing *Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985); then citing *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 442–43 & n.1 (D.C. Cir. 1989); and then citing *Texas v. United States* ("*DAPA*"), 809 F.3d 134, 153(5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016)). Or "when [states] believe that the federal government has intruded upon areas traditionally within states' control." *Id.* (first citing *DAPA*, 809 F.3d at 153; and then citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). Moreover, "damage [to a] state['s] econom[y]" and harm to its citizens' well-being implicates a state's standing to sue in its quasi-sovereign capacity. *Id.* at 599.

The States meet the first requirement. The APA provides the States with a broad procedural right to challenge agency action. 5 U.S.C. § 702. Courts have recognized that—when it comes to immigration policy—states have a procedural right to challenge "DHS's affirmative decision to set guidelines." *DAPA*, 809 F.3d at 152; *see also Texas v. Biden* ("*MPP*"), 20 F.4th 928, 970 (5th Cir. 2021) (citing 5 U.S.C. § 702) (concluding that Texas had a procedural right under the APA to challenge agency action), *cert. granted*, *Biden v. Texas*, --- U.S. ---, 2022 WL 497412 (Feb. 18,

2022). The States allege they are "suffering legal wrong because of agency action" under the APA, so they meet this requirement. 5 U.S.C. §§ 702, 704; *cf. Massachusetts*, 549 U.S. at 516–17.

The States also meet the second requirement. Detention and removal of criminal aliens requires federal-state cooperation. Doc. No. 4-15 at PageID 302–04; Doc. No. 4-18 at PageID 344; *see also* ICE Detainer Policy, at 2. A removable noncitizen might go undetected until arrested for, and convicted of, a state criminal offense. Doc. No. 4-15 at PageID 302–04. DHS relies on state law enforcement officers to not only fulfill detainers against criminal aliens, but also to investigate, prosecute, detain, and supervise them. *Id.*; Doc. No. 27-8 at PageID 503–04. The States must expend these public-safety and law enforcement resources regardless of the rate at which DHS detains and removes criminal aliens. Doc. No. 1 at PageID 9–15.

In that way, the States share the cost of immigration enforcement with the federal government. Doc. No. 4-15 at PageID 302–04; Doc. No. 4-18 at PageID 344; Doc. No. 27-8 at PageID 503–04. Criminal aliens might be subject to a term of state imprisonment followed by a judge-imposed term of supervised release. Doc. No. 4-18 at PageID 344; *see also Arizona*, 2021 WL 2787930, at *7. The States pay to impose this sentence until DHS takes custody. *Arizona*, 2021 WL 2787930, at *7 (explaining Arizona's per-criminal supervision cost). If DHS chooses to detain and remove fewer criminal aliens, the cost of further post-release supervision, and possible recidivism, falls on the States. *Id.* Though DHS suggests that increased supervision costs are, at most, a self-imposed injury, Doc. No. 29 at PageID 706, this ignores the essential first-line-of-defense role that the States play in immigration enforcement. Assuming for the purposes of this motion to dismiss that the Permanent Guidance has caused a net decrease in DHS's detention and removal of criminal aliens, the States will invariably bear a greater portion of the federal/state

cost-sharing inherent to immigration enforcement. Doc. No. 1 at PageID 9–15. The States' quasi-sovereign interests in immigration enforcement are, therefore, strong. *See, e.g.*, *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601 (recognizing the states' authority to "exercise . . . sovereign power over individuals" within their borders); *see also Saginaw Cnty.*, 946 F.3d at 957 (noting states can sue the federal government when "the State does not have its usual recourse to state law and state enforcement proceedings to vindicate its interests").

The States are entitled to special solicitude. Thus, they have a reduced burden to show redressability and imminence. *See Massachusetts*, 549 U.S. at 517–18. Because "no prudential bar prevents the states from suing the United States to vindicate their . . . quasi-sovereign interests," the Court must next consider whether the states "have also shown 'the irreducible constitutional minim[a]' to establish Article III standing." *Kentucky*, 23 F.4th at 601 (alterations in original) (quoting *Lujan*, 504 U.S. at 560).[10]

2. Injury[11]

The States allege a concrete, particularized injury. To prove an injury-in-fact, "the claimant must establish the 'invasion of a legally protected interest' that is 'concrete and

[10] At times, the Sixth Circuit has expressed skepticism about the modern concept of state standing, noting that federal courts previously could not adjudicate state-led lawsuits that did not provide a basis for justiciability at common law, *i.e.*, property or contract rights. *See Saginaw Cnty.*, 946 F.3d at 956 (citing Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 392–93 (1995)); *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 286–89 (1888); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 73–77 (1867) (finding "sovereignty interests" nonlitigable). While the Supreme Court has trended towards a historical, traditional approach to deciding whether an injury is justiciable, *see Spokeo*, 578 U.S. at 339, and when finding certain elements of standing, *see, e.g.*, *Uzuegbunam*, 141 S. Ct. at 797–800, neither it nor the Sixth Circuit have indicated whether they wish to bar states from vindicating an injury to their quasi-sovereign interests, *see, e.g.*, *Massachusetts*, 549 U.S. at 517–20.

[11] DHS argues the States have not suffered an injury because there is "'no judicially cognizable interest in procuring enforcement of the immigration laws' against someone else." Doc. No. 29 at PageID 705 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984)). True, "a *private citizen* lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D*, 410 U.S. 614, 619 (1973) (emphasis added) (first citing *Younger v. Harris*, 401 U.S. 37, 42 (1971); then citing *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); and then citing *Poe v. Ullman*, 367 U.S. 497, 501 (1961)). But this does not preclude the *States* from litigating in their quasi-

particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Gerber*, 14 F.4th at 505–06 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)). A particularized injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. "A 'concrete' injury is one that 'actually exist[s].'" *Gerber*, 14 F.4th at 506 (quoting *Spokeo*, 578 U.S. at 339) (alterations in original). "[C]ourts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts" when determining concreteness. *TransUnion LLC v. Ramirez*, --- U.S. ---, 141 S. Ct. 2190, 2204 (2021) (quoting *Spokeo*, 578 U.S. at 341). Traditional, concrete harms include "monetary harms." *Id.* at 2205.

The States identify three categories of expenditures affected by DHS's enforcement priority scheme: (1) public safety; (2) health care; and (3) education. Doc. No. 1 at PageID 9–15; Doc. No. 34 at PageID 895–901. According to the States, none of this spending is discretionary. Doc. No. 1 at PageID 9–15. Local law enforcement must respond to crimes allegedly committed by noncitizens; federal law requires Emergency Medicaid dollars to be spent on noncitizen care[12]; and public schools must enroll noncitizen children. Doc. No. 34 at PageID 895–901.

More previously removable noncitizens in their jurisdiction means the States must devote more resources to these categories. *Id.* The States show that, in December 2021, DHS detained fewer noncitizens with criminal convictions or pending charges per day (4,296) compared to December 2019 (16,388) and December 2020 (10,336). Doc. No. 34 at PageID 897. This

sovereign or sovereign capacity. *See Kentucky*, 23 F.4th at 598–601. Whether the States have standing depends on if they have suffered an injury-in-fact. *See Saginaw Cnty.*, 946 F.3d at 957.

[12] 42 C.F.R. § 440.255(c) (Emergency Medicaid for noncitizens); Ohio Admin. Code 5160:1-5-06 (2021) (same); Mont. Code Ann. § 1-1-411 (2022), *invalidated by Mont. Immigrant Just. All. v. Bullock*, 371 P.3d 430, 446 (Mont. 2016) (finding Montana's statute that denied certain state services to illegal aliens preempted and invalid).

difference, the States believe, will cause a net increase in law enforcement expenditures. *Id.* at PageID 897–98

DHS thinks this harm is speculative. Doc. No. 29 at PageID 705. It points to data showing that arrest of noncitizens with aggravated felonies actually increased in between February and August 2021 (6,046) compared to the same period in 2020 (3,575). *Id.* at PageID 706. DHS contends a targeted enforcement approach saves the States money in the long run because it increases the odds the worst offenders will be taken in DHS custody. *Id.*

But the States have plausibly shown these costs have accrued, and will continue to do so, even if the priority shift generates some offsetting benefit. *See, e.g.*, *Markva v. Haveman*, 317 F.3d 547, 557–58 (6th Cir. 2003) (grandparents had standing to sue over requirement that they pay more for Medicaid benefits than similarly situated parents even though their other welfare benefits outweighed this harm); *cf. Massachusetts*, 549 U.S. at 523–25 (Massachusetts's injury from global warming was concrete even though China's and India's pollution might offset domestic pollution). This financial impact is a "tangible" one. *TransUnion*, 141 S. Ct. at 2204. In the District of Arizona litigation over the Interim Guidance, for example, Arizona identified noncitizens with criminal convictions who were placed on state supervision after DHS lifted their detainers under the Interim Guidance. *Arizona*, 2021 WL 2787930, at *7. A decrease in detention and removal of criminal aliens will invariably lead to similar results in Montana and Ohio. Doc. No. 1 at PageID 9–15.

An aggregate decline in removals will also cause the States to devote more emergency Medicaid and educational resources to noncitizens than they otherwise would have. *Id.*; see *Arizona*, 2021 WL 2787930, at *7. The States allege that, since the enforcement priority shift began with the January 20 Memo, DHS has only removed 18,713 individuals from January to July

2021 compared to 186,089 during the same period in 2019. Doc. No. 34 at PageID 885; *see also* Doc. No. 4-8 at PageID 178–79; Doc. No. 4-11 at PageID 203–04. Fewer detentions and removals increase the number of noncitizens eligible to receive state assistance. *Cf. MPP*, 20 F.4th at 970 (concluding Texas had demonstrated injury-in-fact by showing a reverse of DHS's MPP program policy would make more noncitizens eligible to receive a driver's license); *Pennsylvania v. President United States*, 930 F.3d 543, 561–64 (3d Cir. 2019) (finding states sufficiently alleged injury when they showed that an agency's contraceptive mandate would increase reliance on States' services), *overruled on other grounds by Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, --- U.S. ---, 140 S. Ct. 2367 (2020).

Considering (1) the downward trend in removals under the Permanent Guidance and its predecessor policies; (2) the plausible increase in public expenditures due to a rise in the States' respective noncitizen populations; and (3) the mandatory nature of the States' law enforcement duty and public benefit laws, the States have demonstrated a plausible, "certainly impending, or . . . substantial risk" of harm. *See Dep't of Com.*, 139 S. Ct. at 2565 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)) (finding that states could challenge census bureau for including a question about country of residence because it would undercount noncitizen residences, which would lead to less federal funding). Thus, the States have identified a concrete, particular injury-in-fact.

3. Traceability

The States' injury is traceable to the Permanent Guidance. "Standing requires 'a causal connection between the injury and the conduct complained of' which means that the injury is 'fairly . . . trace[able] to the challenged action of the defendant,' not some 'independent action of some third party.'" *Garland v. Orlans, PC*, 999 F.3d 432, 440–41 (6th Cir. 2021) (alterations in original) (quoting *Lujan*, 504 U.S. at 560). "At the pleading stage, the plaintiff's burden of

'alleging that their injury is "fairly traceable"' to the defendant's challenged conduct is 'relatively modest[.]'" *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020) (alteration in original) (quoting *Bennett v. Spear*, 520 U.S. 154, 171 (1997)). Although "[a] self-inflicted injury, by definition is not traceable to anyone but the plaintiff[,]" even "harms that flow 'indirectly from the action in question'" satisfy traceability. *Id.* (quoting *Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003)).

When DHS pulls back immigration enforcement, the States pick up some of the cost. Doc. No. 1 at PageID 9–15. "The causal chain is easy to see." *MPP*, 20 F.4th at 972 (citing *Massachusetts*, 549 U.S. at 523). As the *Arizona* district court found in litigation over the Interim Guidance, it is inevitable that a decrease in detainer executions will force states to expend resources on post-release supervision that, but for the Permanent Guidance, DHS would provide through its detention program. *Arizona*, 2021 WL 2787930, at *7.

DHS argues that this is a self-inflicted injury because the States do not have to impose community supervision. Doc. No. 29 at PageID 706. True enough. But DHS misses that, prior to the Permanent Guidance, DHS would have detained at least some of the noncitizens it will now release. The States must now step in when DHS does not. *Cf. Dep't of Com.*, 139 S. Ct. at 2566 (reasoning that a "predictable" effect of agency policy makes the harm more than speculative).[13] Such an injury is fairly traceable to the Permanent Guidance.

[13] DHS relies on *Buchholz v. Meyer Njus Tanick, P.A.*, 946 F.3d 855 (6th Cir. 2020), where a debtor who allegedly suffered an injury over fear that he would be subject to legal action if he did not pay in response to a debt collector's letters. Doc. No. 29 at PageID 706. It argues the States' alleged injury is similar because any increase in spending related to noncitizens is at their discretion. *Id.* *Buccholz*, however, is distinguishable. Because the debtor in that case did not pay his debts and "[feared] the consequences of his delinquency," the Sixth Circuit found that his injury was purely self-inflicted. *Id.* at 867. In contrast, DHS triggered the causal chain that led to the States' harm when it enacted the Permanent Guidance. *See, e.g.*, *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 537–39 (D.C. Cir. 2019) (traceability requirement was satisfied when political party chose to place excess escrow amount in segregated fund available for specific purposes after Federal Election Committee forbade a political party from placing it into their

4. Redressability

The States' injury is redressable. To be redressable, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotation omitted). Thus, "[a]n injury is redressable if a judicial decree can provide 'prospective relief' that will 'remove the harm.'" *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (quoting *Warth*, 422 U.S. at 505). Under the APA, when a litigant has a procedural right to sue, that litigant proves redressability if "there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518 (first citing *Lujan*, 504 U.S. at 573 n.7; and then citing *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002)).

DHS argues that enjoining the Permanent Guidance would not necessarily return State spending to prior levels. Doc. No. 29 at PageID 708–09. DHS—due to resource constraints—must necessarily prioritize certain enforcement actions over others. *Id.* It insists that the States cannot show any other combination of priorities could reduce crime in their jurisdictions or limit the number of noncitizens relying on public services. *Id.*

The Court disagrees. If the Court enjoins the Permanent Guidance, then DHS may reconsider enacting a similar policy or resume removals at its previous pace. *Cf. Massachusetts*, 549 U.S. at 518. Any revision to the priority categories would necessarily be less under-inclusive than the Permanent Guidance. The "harms that allegedly flow" from DHS's policy might then dissipate. *Kentucky*, 23 F.4th at 601.

---

general fund). The injury here was not purely self-inflicted because the States' devotion of extra criminal justice, healthcare, and Emergency Medicaid expenditures is "the predictable effect of Government action." *Dep't of Com.*, 139 S. Ct. at 2565; *see also* 13A Wright, Miller, & Cooper, Federal Practice & Procedure § 3531.5 (3d ed. 2014) ("Standing is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain").

Therefore, the Court finds the States have standing to bring their claims. It must now address whether the States can obtain judicial review under the APA.

B. Judicial Review Under the APA

"The Administrative Procedure Act embodies a 'basic presumption of judicial review,' and instructs reviewing courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Dep't of Com.*, 139 S. Ct. at 2567 (first quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); and then quoting 5 U.S.C. § 706(2)(A)). "This presumption is a strong one, and an 'agency bears a "heavy burden"' in proving that Congress intended to preclude all judicial review." *Duncan v. Muzyn*, 833 F.3d 567, 576 (6th Cir. 2016) (first quoting *Mach Mining, LLC v. EEOC*, 575 U.S 480, 486 (2015); and then quoting *Abbott Laboratories*, 387 U.S. at 140). Still, a challenger to agency action must first traverse several threshold barriers to obtain APA review. Review is unavailable "to the extent that . . . (1) statutes preclude review or (2) agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a)(1) and (2) (cleaned up). Reviewable agency action must be "final" and "for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. DHS asserts that the States fail to surpass any of these threshold barriers. Doc. No. 29 at PageID 709–20.

1. Committed to Agency Discretion

Section 701(a)(2) "has caused confusion and controversy since its inception." *Barrios Garcia v. Dep't of Homeland Sec.*, 25 F.4th 430, 445 (6th Cir. 2022) (quoting Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. Chi. L. Rev. 1047, 1050 (2006)). A "formalistic" interpretation of "committed to agency discretion" seemingly contradicts the APA's "abuse of discretion" standard of review. *Id.* For this reason, "[t]he Supreme Court has . . . rejected a literal reading of

§ 701(a)(2)," *id.*, and has construed the exception "narrow[ly]," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). An agency decision is only committed to its "discretion," and is therefore unreviewable, "where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Webster v. Doe*, 486 U.S. 592, 599–600 (1988)).

Agency nonenforcement decisions are among the "limited category" of discretionary and unreviewable agency actions. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, --- U.S. --- , 140 S. Ct. 1891, 1905 (2020). In *Heckler v. Chaney*, the Supreme Court held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." 470 U.S. 821, 832 (1985). This is principally because nonenforcement decisions are based on a "balancing of factors which are peculiarly within [the agency's] expertise" and unsuitable for judicial administration. *Id.* at 831.

DHS insists that the Permanent Guidance is the type of nonenforcement action described in *Chaney* and thus is a decision committed to its discretion. Doc. No. 29 at PageID 709. Central to this argument is DHS's view that the Permanent Guidance is but an extension of its prosecutorial discretion. *Id.* at PageID 709–13. It explains that Congress endowed the agency with significant discretion to decide when, how, and against whom to bring enforcement proceedings. *Id.* The flip side of the power to bring enforcement is declination. *Id.* Adopting a policy instructing its officials on how to deploy their discretion is, in DHS's telling, tantamount to a discretionary nonenforcement decision. *Id.*

The States do not necessarily disagree that DHS has discretion to *bring* enforcement proceedings. Doc. No. 4 at PageID 66. Instead, the States assert that DHS's discretion is not unlimited and is bounded by important statutory commands, namely 8 U.S.C. §§ 1226(c) and

1231(a)(1)(A). *Id.* at PageID 76–78. Their contention is that the Permeant Guidance's assertion of discretion contravenes those mandates. *Id.*

The Court, as explained below, agrees with the States. DHS's Permanent Guidance purports to introduce an extra-statutory balancing scheme to govern each step of the enforcement process. Doc. No. 4-1 at PageID 100 (explaining the Permanent Guidance applies to decisions made through "apprehension and removal"). While DHS may exercise unquestioned discretion over some aspects of the enforcement process, *see, e.g.*, *AADC*, 525 U.S. at 483 ("At each stage [of the removal process] the Executive has discretion to abandon the endeavor"), Congress has instructed it to follow certain steps when it comes to detention of criminal aliens pending removal proceedings and execution of removal orders. The Permanent Guidance's totality-of-the-circumstances analysis is far more than a nonenforcement decision. *Cf. Regents*, 140 S. Ct. at 1906 (declining to apply the *Chaney* presumption to DHS's revocation of the Deferred Action for Childhood Arrivals ("DACA") program because it was "not simply a non-enforcement policy"). Rather, it changes the substantiative standard ERO officials apply when making bond determinations under 8 U.S.C. § 1226(c)(1) and removal decisions under 8 U.S.C. § 1231. That decision was not one left to DHS's discretion.

a. Heckler v. Chaney

DHS relies on *Chaney* for the proposition that "decisions concerning enforcement" are unsuitable for judicial review. Doc. No. 29 at PageID 709 (citing *Chaney*, 470 U.S. at 831). In *Chaney*, the Supreme Court flipped the regular presumption of APA review on its head. *Chaney*, 470 U.S. at 831. An agency nonenforcement action is only reviewable "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833.

Chaney involved whether incarcerated persons could compel the FDA to recommend enforcement actions to stop states from using specific lethal-injection drugs in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). *Id.* at 823–24. Under the FDCA's enforcement provision, the Secretary is only "authorized to conduct examinations and investigations." *Id.* at 835 (cleaned up) (quoting 21 U.S.C. § 372). The Court determined that the FDCA "charges the Secretary only with recommending prosecution; any criminal prosecutions must be instituted by the Attorney General." *Id.* Such language fully "committed" the decision not to recommend prosecution to the FDA Secretary's discretion. *Id.* at 835, 837.

The *Chaney* Court was clear, however, that its "narrow" exception to general presumption of reviewability applied to *non*enforcement decisions. *Id.* at 831, 837 ("This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to *refus*e enforcement" (emphasis added)). Nonenforcement decisions are a product of policy-based decisions that are unsuitable for judicial review. *Id.* at 831–32 ("An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities" (citation omitted)). Agency nonaction does not involve an "exercise [of] coercive power over an individual's liberty or property rights . . . . [But] when an agency does act to enforce . . . [t]he action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* at 832 (emphasis removed) (citing *FTC v. Klesner*, 280 U.S. 19, 50 (1929)).

DHS suggests that *Chaney* extends beyond one-shot enforcement decisions and applies to enforcement policies like the Permanent Guidance that could lead to non-enforcement. Doc. No. 29 at PageID 709–13. There is little, if any, support for this view, considering that *Chaney* focused

on policy-based factors underpinning a one-off instance of nonenforcement. *Cf. Regents*, 140 S. Ct. at 1906 (declining to apply *Chaney* where DHS's DACA policy went beyond "a passive non-enforcement policy"). But even if the Court were to apply the *Chaney* presumption in this case, it would find it rebutted by the specific "legislative direction in the [IIRIA's] statutory scheme that [DHS] administers." *Chaney*, 470 U.S. at 833.

b. Textual Analysis

Determining whether the relevant statutes provide a "judicially manageable" standard begins with the text. *Chaney*, 470 U.S. at 830. Courts engaged in statutory interpretation "must give effect to the clear meaning of statutes as written." *Kentucky v. Biden*, 23 F.4th 585, 603 (6th Cir. 2022); (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, --- U.S. ---, 137 S. Ct. 1002, 1010 (2017)). Each word of the statute must be given "'its ordinary, contemporary, common meaning,' while keeping in mind that '[s]tatutory language has meaning only in context.'" *Id.* (first quoting *Star Athletica*, 137 S. Ct. at 1010; and then quoting *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005)). Courts must not "woodenly interpret a legal text 'in a vacuum,' but instead discern 'the meaning of a statement' in a law from the 'context in which it is made.'" *United States v. Tate*, 999 F.3d 374, 378 (6th Cir. 2021) (first quoting *Abramski v. United States*, 573 U.S. 169, 179 (2014); and then quoting *United States v. Briggs*, --- U.S. ---, 141 S. Ct. 467, 470 (2020)).

i. § 1226(c)(1)

Section 1226 divides removable noncitizens into two categories: "criminal aliens" and all others. 8 U.S.C. §§ 1226(a), (c). "Criminal aliens" are those noncitizens convicted of an "aggravated felony" as described in 8 U.S.C. § 1226(c)(1)(A)–(C) or close relatives of a terrorist and those thought likely to engage in terrorism, § 1226(c)(1)(D). *See Nielsen v. Preap*, --- U.S. ---, 139 S. Ct. 954, 960 (2019) (identifying covered noncitizens under § 1226(c)(1)). The "Attorney

General *shall* take into custody" criminal aliens "when the alien is released" and may release the criminal alien "only if" the limited circumstances of § 1226(c)(2) apply. 8 U.S.C. § 1226(c)(1), (2).

It is first important to identify when in the removal process § 1226(c) comes into play. Section 1226(a) "provides that DHS may arrest and detain the alien 'pending a decision on whether the alien is to be removed from the United States.'" *Guzman Chavez*, 141 S. Ct. at 2240 (quoting 8 U.S.C. § 1226(a)). Or the Attorney General, "[e]xcept as provided in subsection (c) and pending such decision," may release the noncitizen on bond. 8 U.S.C. § 1226(a). "Pending"—when used as a preposition like in § 1226(a)—means "during," "while in the process of," or "awaiting." *Pending*, *American Heritage Dictionary of the English Language* (4th ed. 2000). So, § 1226(a) permits DHS to arrest and detain a noncitizen "during" or while he or she "awaits" removal proceedings. The implication is that § 1226(a) does not authorize arrest and detention unless and until removal proceedings have begun.

Section 1226, of course, says more. "Aliens who are arrested and detained may generally apply for release on bond or conditional parole." *Guzman Chavez*, 141 S. Ct. at 2280 (citing § 1226(a)(2)). "The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien." 8 U.S.C. § 1226(b). In other words, the Attorney General may decide at will whether to detain or release on bond a non-criminal alien "awaiting" removal proceedings. *See, e.g.*, *Preap*, 139 S. Ct. at 960 ("But while 8 U.S.C. § 1226(a) generally permits an alien to seek release [pending their removal proceeding], that provision's sentence on release states that all this is subject to an exception that is set out in § 1226(c)").

Section 1226(c)—entitled "detention of criminal aliens"—drops the permissive "may." Instead, the "Attorney General shall take into custody any" criminal alien "when the alien is released." 8 U.S.C. § 1226(c). Because a "criminal alien" is someone who previously "committed" an offense listed in subsections (A)–(C), "when the alien is released" refers to release from the custody of the law enforcement agency that detained the criminal alien after commitment of a covered offense. *See Preap*, 139 S. Ct. at 965.

Section 1226(c) only refers to when the law enforcement agency and DHS exchange custody of the criminal alien. It does not state when, and for how long, DHS "shall take custody" of the criminal alien. 8 U.S.C. § 1226(c). But, of course, § 1226(c) is an exception to § 1226(a), and the two provisions must be read in tandem. Indeed, the Supreme Court has construed § 1226 in just this way on several occasions. *See Preap*, 139 S. Ct. at 960 (describing § 1226(c) as an exception to the general rule that noncitizens arrested under § 1226(a) can petition for bond); *see also id.* at 966 ("We read each of subsection (c)'s two provisions—paragraph (1) on arrest, and paragraph (2) on release—as modifying its counterpart sentence in subsection (a)"); *see also id.* ("The text of § 1226 itself contemplates that aliens arrested under subsection (a) may face mandatory detention under subsection (c)"). Section 1226, therefore, provides that DHS must detain "criminal aliens" pending their removal proceeding; all other noncitizens may be released on bond. *See Jennings*, 138 S. Ct. at 846 ("And together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue 'pending a decision on whether the alien is to be removed from the United States'" (quoting 8 U.S.C. § 1226(c))); *Demore*, 538 U.S. at 517–18 ("Section 1226(c) mandates detention *during removal proceedings* for a limited class of deportable aliens" (emphasis added)).

DHS argues that "shall" really means "may." Doc. No. 29 at PageID 710. The consequence of this reading is that DHS "may" release "criminal aliens" pending their removal proceeding as if they were non-criminal aliens covered by § 1226(a). *Id.* at PageID 723.[14] This interpretation, however, reads § 1226(c) out of the statute.

Part of DHS's argument is based on the Supreme Court's recognition that DHS has plenary authority to enforce the immigration laws. *See, e.g.*, *AADC*, 525 U.S. at 483. Citing the volume of potentially removable noncitizens in the United States (11 million) and Congress's decision not to appropriate sufficient funds to upgrade DHS's enforcement capabilities, DHS asserts that it must make hard choices and prioritize the removal of certain non-citizens over others. Doc. No. 29 at PageID 724–25. It insists that prosecutorial discretion principles give agencies authority to selectively chose when to enforce laws despite the legislature's use of seemingly mandatory language. *Id.* at PageID 710–11 (citing *Castle Rock v. Gonzalez*, 545 U.S.748, 761 (2005)). Both arguments are misguided.

No doubt that DHS has discretion to choose whom to enforce the immigration laws against. *See, e.g.*, *AADC*, 525 U.S. at 483 ("At each stage [of the removal process] the Executive has discretion to abandon the endeavor"). Even the States acknowledge that. Doc. No. 4 at PageID 66. But extending that prosecutorial discretion principle to § 1226(c) mistakes the statute for what it is: a bond provision. *See Jennings*, 138 U.S. at 837 ("Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien . . . [and] may release the alien" unless that alien is covered by § 1226(c)(1)'s "carveout"). Congress—citing high rates of abscondment and recidivism concerns—enacted § 1226(c) to mandate that criminal

[14] DHS makes this argument in response to the States' contention that § 1226(c) also determines which non-citizens must be subject to enforcement actions. Doc. No. 4 at PageID 77–78; Doc. No. 29 at PageID 723. But the knock-on effect of reading § 1226(c) as permissive, rather than mandatory, would also allow ERO officials to ignore the statute while making custody determinations.

aliens be detained during their enforcement proceedings. *See Preap*, 139 S. Ct. at 960 ("Section 1226(c) was enacted as part of the [IIRIRA], and it sprang from a 'concer[n] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers.'" (quoting *Demore*, 538 U.S. at 513). DHS cites no authority allowing it to discard Congress's judgment on who should be mandatorily detained after removal proceedings have commenced. Doc. Nos. 29, 34.

DHS's reliance on *Castle Rock* is also misplaced. That case involved a criminal law statute dealing with the enforcement of restraining orders. *Castle Rock*, 545 U.S. at 758–59. Specifically, the statute provided "[a] peace officer *shall* use every reasonable means to enforce a restraining order" and "*shall* arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person" upon probable cause "[t]he restrained person has violated or attempted to violate any provision of a restraining order." *Id.* (emphasis in original). The question was whether the statute's use of "shall" made enforcement mandatory. *Id.* at 760.

The Supreme Court said no. *Id.* at 761. "The deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands" does not mean law enforcement officials are entirely deprived of prosecutorial discretion. *Id.* (citing *Chicago v. Morales*, 527 U.S. 41 (1999)). "[C]ommon sense" dictates "that all police officers must use some discretion" in choosing whether to enforce a law. *Id.* (quoting *Morales*, 527 U.S. at 62). "The practical necessity for discretion is particularly apparent" when the "circumstances of the violation" counsel against enforcement. *Id.* at 761–62.

Castle Rock is inapplicable. The question here is not—as it was in that case—whether a statute's use of "shall" removes law enforcement officer's discretion. Rather, § 1226 does not apply until enforcement proceedings have been, or will be, brought. *See, e.g.*, *Jennings*, 138 U.S.

at 837 ("Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien . . . [and] may release the alien" unless that alien is covered by § 1226(c)(1)'s "carveout"); *see also* 8 C.F.R. § 1003.14 ("[N]o charging document [*i.e.*, a Notice to Appear] is required to be filed with the Immigration Court to commence bond proceedings"). Congress mandated that criminal aliens must be detained pending their removal proceedings. *Cf. Preap*, 139 S. Ct. at 970 ("[T]he Secretary's failure to make an arrest immediately upon a covered alien's release would not have exempted the alien from mandatory detention under § 1226(c)"). This straight-forward command provides a "judicially manageable" standard to gauge DHS's exercise of discretion against.

ii. § 1231(a)(1)(A)

DHS makes the same interpretative mistakes with 8 U.S.C. § 1231(a)(1)(A). Doc. No. 29 at PageID 721. This provision states that DHS "shall remove the alien from the United States within a period of 90 days" from "when an alien is ordered removed." 8 U.S.C. § 1231(a)(1)(A). A noncitizen "shall be detain[ed]" during the removal period. 8 U.S.C. § 1231(a)(2); *Guzman Chavez*, 141 S. Ct. at 2281 ("During the removal period, detention is mandatory" (citing 8 U.S.C. § 1231(a)(2))). Under no circumstances may "criminal aliens" be released during the removal period. 8 U.S.C. § 1231(a)(2).

"DHS routinely holds aliens under these provisions when geopolitical or practical problems prevent it from removing an alien within the 90-day period." *Guzman Chavez*, 141 S. Ct. at 2291 (citing *Zadvydas*, 533 U.S. at 684–86). Section 1231(a)(1)(C) recognizes that if removal is not accomplished during the removal period, it "shall be extended . . . if the alien fails or refuses to make timely application in good faith for travel or other documents" or otherwise obstructs removal. 8 U.S.C. § 1231(a)(1)(C). DHS may also release, and place under supervision,

noncitizens with a final removal order who were not removed during the 90-day period. 8 U.S.C. § 1231(a)(3).

The States argue that DHS "must" remove non-citizens with final removal orders within 90 days absent application of one of § 1231's enumerated exceptions. Doc. No. 4 at PageID 76. DHS again reads "shall" permissively. Doc. No. 29 at PageID 721. It contends that the mandatory language must be flexible enough to afford ERO officials removal discretion. *Id.* at PageID 723.

But this interpretation contradicts § 1231(a)(2)'s mandatory detention language. 8 U.S.C. § 1231(a)(2). Noncitizens with final removal orders, especially those meeting the criminal alien definition, must be detained during the removal period. *Guzman Chavez*, 141 S. Ct. at 2281. Congress left no flexibility for DHS to release some noncitizens during the removal period.

Congress was also not ignorant of the fact that removal may not be practicable within 90 days. *See, e.g.*, *Guzman Chavez*, 141 S. Ct. at 2291. That is why it set forth certain factors for DHS to consider before enrolling a noncitizen into the post-removal period. 8 U.S.C. § 1231(a)(3). Section 1231(a)(3) explicitly directs DHS to promulgate regulations to assess whether a non-citizen should be released on bond during the post-removal period but prior to their removal. DHS obliged and, through notice-and-comment rulemaking, created a litany of considerations for ERO officials to apply before granting a post-removal bond. 8 C.F.R. §§ 241.4(e), (f) (factors include whether "[t]he detainee is presently a non-violent person"; whether "[t]he detainee is not likely to pose a threat to the community following release"; and factors concerning the noncitizen's propensity to commit crime, including "ties to the United States such as the number of close relatives residing here lawfully").

DHS has discretion to decide whether one of § 1231(a)(1)(A)'s exceptions apply. But that discretion does not mean it can ignore the exceptions that Congress instructed it to follow. *Cf.*

TRW, Inc. v. Andrews, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent" (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980))). For that reason, § 1231 too provides a manageable standard to judge the Permanent Guidance against.

c. The Permanent Guidance is Contrary to 8 U.S.C. §§ 1226(c)(1) and 1231

Like the January 20 memo and Interim Guidance, the Permanent Guidance intends to guide ERO officials' decision-making through "apprehension and removal." Doc. No. 4-1 at PageID 100; Doc. No. 27-9 at PageID 508; Doc. No. 27-10 at PageID 512. This includes custody and removal decisions. Doc. No. 4-1 at PageID 100. The Permanent Guidance's public safety priority category requires ERO officials to weigh aggravating (*i.e.*, "gravity of the offense," "nature and degree of harm") alongside mitigating (*i.e.*, "age," mental health, family ties) factors before making "apprehension and removal" decisions. *Id.* Such factors are to be applied at each stage of the removal process. *Id.*

This balancing analysis is acceptable at certain points in the removal process. For instance, the statute concerning Notices to Appear—8 U.S.C. § 1229a—sets forth the contents of a valid charging document. But the statute does not mandate when, or against whom, DHS must issue Notices to Appear. 8 U.S.C. § 1229a. This is because "[f]or more than a century, Congress has afforded the Attorney General (or other executive officials) discretion to allow otherwise removable aliens to remain in the country." *Niz-Chavez v. Garland*, --- U.S. ---, 141 S. Ct. 1474, 1478 (2021).

Once the wheels of the removal process began to turn, however, Congress made some decisions non-discretionary. As explained above, once DHS decides to initiate removal

proceedings against a non-citizen whose conviction or terrorist association makes them a "criminal alien," DHS must detain that person for the duration of their removal proceeding. 8 U.S.C. § 1226(c). Congress also set forth enumerated exceptions to its general command that DHS "shall remove" non-citizens within 90 days from when their removal order became final. 8 U.S.C. § 1231.

The Permanent Guidance displaces the custody and removal factors Congress intended DHS officials to consider for its extra-textual totality-of-the-circumstances analysis. Doc. No. 4-1 at PageID 100. ERO officials cannot simultaneously comply with what is required by 8 U.S.C. §§ 1226(c) and 1231 and the Permanent Guidance. Here is why.

i. § 1226(c)(1)

The Secretary explains that ERO officials "should not rely on the fact of conviction or the result of a database search alone" when making an enforcement-related decision. Doc. No. 4-1 at PageID 101. This includes custody decisions. *Id.* at PageID 100. The Permanent Guidance instead requires a weighing of aggravating and mitigating factors before making a custody decision. *Id.* Congress, however, thought otherwise. *See Jennings*, 138 S. Ct. at 846 ("And together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue 'pending a decision on whether the alien is to be removed from the United States' (quoting 8 U.S.C. § 1226(a))).

Recall that § 1226(c) mandates that non-citizens who have "committed" certain enumerated offenses be detained during the removal proceedings. Section 1226(c)(A)–(C) refer to 8 U.S.C. §§ 1182 and 1227 to define what criminal convictions warrant mandatory detention. Section 1227 establishes that non-citizens convicted of certain criminal offenses "shall . . . be removed." Included are, *inter alia*, crimes of "moral turpitude," "controlled substance traffick[ing]," "aggravated felonies," or "for which the aggregate sentences to confinement were

5 years or more." 8 U.S.C. §§ 1227(a)(2)(A)–(C). Congress provided for some consideration of mitigating factors. For example, a non-citizen 18 years of age or younger who commits a crime of "moral turpitude" is not barred from the statute's general prohibition. 8 U.S.C. § 1227(a)(2)(A)(ii)(I).[15] Minor exceptions aside, Congress directed DHS to detain criminal aliens during their removal proceeding based on the nature of their conviction. 8 U.S.C. § 1226(c). The Permanent Guidance's direction to examine factors outside the statute to make custody determinations contradicts Congress's express mandate.

Strange results follow if the outcome were otherwise. Take "aggravated felonies" for example. That term serves two purposes. First, commission of an "aggravated felony"[16] is grounds for removal per 8 U.S.C. § 1227(a)(2)(A)(iii). *Sessions v. Dimaya*, --- U.S. ---, 138 S.Ct. 1204, 1210, 1211 (2018) ("[R]emoval is a virtual certainty for an alien found to have an aggravated felony conviction"). Noncitizens convicted of "aggravated felonies" must also be detained pending their removal proceedings. 8 U.S.C. § 1226(c)(1)(B) (cross referencing 8 U.S.C. § 1227(a)(2)(A)(iii)). It would not make sense if DHS could, on one hand, seek removal because a noncitizen committed an aggravated felony but, on the other, release the noncitizen on bond pending their removal proceeding. *Cf. Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 254 (6th Cir. 2020) ("Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available" (citation omitted)). The Court cannot sanction such a construction of § 1226(c).

[15] Section 1182(a)(2) explains that most of the same offenses as those listed in § 1227 render a non-citizen ineligible for a visa or admission into the United States. 8 U.S.C. § 1182(a).

[16] Section 1227(a)(2)(A)(iii) refers the reader to the INS's definitional section to define "aggravated felonies," 8 U.S.C. § 1101(a)(43), which in turn incorporates various acts defined in the federal criminal code.

ii. § 1231(a)(1)(A)

Same with § 1231(a)(1)(A). There Congress made removal within 90 days mandatory absent application of an explicit exception. *See Guzman Chavez*, 141 S. Ct. at 2282 ("If no exception applies, an alien who is not removed within the 90-day removal period will be released subject to supervision" (first citing 8 U.S.C. § 1231(a)(3); and then 8 C.F.R. § 241.5)). Congress even directed DHS to come up with post-removal period supervised release conditions. 8 U.S.C. §§ 1231(a)(3), (a)(6). Notably, DHS did so through notice-and-comment rulemaking. *See* 8 C.F.R. §§ 241.4, 241.5.

The Permanent Guidance is an end-run around § 1231. It permits ERO officials to engage in an extra-textual balancing analysis to make removal decisions. Doc. No. 4-1 at PageID 100. Application of the Permanent Guidance to removal period detention decisions expressly contradicts 8 U.S.C. § 1231(a)(2). The Permanent Guidance allows noncitizens to be released on removal-period and post-removal bond based on factors Congress did not intend DHS to consider and in contrast to DHS's own regulations. 8 U.S.C. § 1231(a)(3); 8 U.S.C. §§ 241.4, 241.5. For that reason, the Permanent Guidance also contravenes § 1231.

DHS argues that even if promulgation of the Permanent Guidance was not a decision "committed to agency discretion," the INA still prohibits judicial review. Doc. No. 29 at PageID 715–18 (citing 5 U.S.C. § 701(a)(1)). For the reasons below, the Court disagrees.

2. Precluded by Statute

"Under § 701(a)(1), the federal courts cannot review an agency action when statutes preclude judicial review." *Barrios Garcia*, 25 F.4th at 442 (internal quotations omitted). Yet there is "a 'strong presumption' favoring review of administrative action." *Mach Mining*, 575 U.S. at 486 (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986)). An "agency bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of

the agency's compliance with a legislative mandate." *Id.* (alterations in original) (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)).

DHS points to three provisions that it claims bar judicial review: 8 U.S.C. §§ 1252(b)(9); 1226(e); and 1231(h). Doc. No. 29 at PageID 715–19. Furthermore, DHS contends that the INA's structure and context precludes review. Doc. No. 38 at PageID 975–77; *see Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). The Court disagrees; neither these provisions, the INA's context, nor its structure precludes APA review.

Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

"Section 1252(b)(9) bars review of claims arising from 'action[s]' or 'proceeding[s]' brought to remove an alien." *Regents*, 140 S. Ct. at 1907 (quoting 8 U.S.C. § 1252(b)(9)). It presents no jurisdictional bar if the challenging parties "are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not . . . challenging any part of the process by which their removability will be determined." *Jennings*, 138 S. Ct. at 841 (plurality opinion). Rather, it "consolidate[s] judicial review of immigration proceedings into one action in the court of appeals, but it applies only with respect to review of an order of removal under subsection (a)(1)." *I.N.S. v. St. Cyr*, 533 U.S. 289, 313–14 (2001) (cleaned up) (citing 8 U.S.C. § 1252(b)).

"[C]hang[ing] the process for deciding who to remove," as DHS argues, is not equivalent to the type of one-off adjudication referred to in § 1252(b)(9). Doc. No. 38 at PageID 976. Section 1252(b)(9) "channel[s] judicial review over final orders of removal to the courts of appeals." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (citing *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012)). This provision does not disturb the APA's general presumption of review, nor foreclose challenges as to DHS's immigration policy, as it "simply provides for the consolidation of issues to be brought in petitions for judicial review." *St. Cyr.*, 533 U.S. at 313 (cleaned up). The States seek to invalidate the DHS's immigration policy, not contest a discrete removal decision. Doc. No. 1. Section 1252(b)(9) is inapplicable. *See, e.g.*, *Regents*, 140 S. Ct. at 1906–07 (finding that states could challenge recission of DACA even though it affected who DHS chose to remove because Section 1252(b)(9) did not bar review).

Section 1226(e) is also no bar to review. It provides that:

> The [Secretary's] discretionary judgment regarding the application of [1226] shall not be subject to review. No court may set aside any action or decision by [DHS] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). "[Section 1226(e)] does not block lawsuits over 'the extent of the Government's detention authority under the "statutory framework" as a whole.'" *Preap*, 139 S. Ct. at 962 (quoting *Jennings*, 138 S. Ct. at 841); *see also Demore*, 538 U.S. at 517. Rather, it only applies to challenges to single removal actions. *See Preap*, 139 S. Ct. at 961–62. The States' challenge to the Permanent Guidance implicates "the Government's detention authority . . . as a whole," *id.* at 963, and purports to alter the criteria ERO officials apply to make detention determinations. *See, e.g.*, Doc. No. 4-1 at PageID 101 ("Our personnel should not rely on the fact of conviction . . . alone"). Thus, Section 1226(e) does not bar review.

Neither does Section 1231(h). It reads:

> Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

8 U.S.C. § 1231(h). Section 1231(h) "simply forbids courts to construe that section to create any . . . procedural right or benefit that is legally enforceable" and is only "limit[ed to] the circumstances in which judicial review of deportation decisions is available." *Zadvydas*, 533 U.S. at 687–88 (internal quotations omitted). The States bring their claim under the APA, 5 U.S.C. § 704, rather than challenge a specific deportation decision. *Cf. Zadvydas*, 533 U.S. at 687–88 (Section 1231(h) did not preclude a noncitizen's habeas corpus claim). Moreover, the context of the statute indicates that "party" likely refers to a noncitizen challenging their final removal order. Section 1231(h) funnels removal order appeals from the immigration courts to the circuit courts of appeal to prevent collateral challenges. *See, e.g.*, H.R. Rep. No. 104-828, at 219 (1996) ("This provision is intended . . . to prohibit the litigation of claims by aliens who have been ordered removed from the U.S. that they be removed at a particular time or to a particular place"). Section 1231(h) does not bar the States' claims because they are not a "party" challenged a particular removal order.

No particular provision of the INA precludes judicial review of the Permanent Guidance. Thus, the remaining structure and legislative context of the statute cannot overcome the "'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 575 U.S. at 486 (quoting *Bowen*, 476 U.S. at 670). Congress intended to bar noncitizens' collateral claims arising from their removal orders; the States' challenge of a broad enforcement policy does not qualify as such a claim. *Cf. J.E.F.M.*, 837 F.3d at 1033–34 (demonstrating that Congress intended only to preclude review of noncitizens' challenges to specific removal decisions outside of the petition for review of a final removal order).

DHS's reliance on *Block* is misplaced. Doc. No. 29 at PageID 716 (citing *Block*, 467 U.S. at 346–47). That case involved a statute authorizing the Secretary of Agriculture to make milk market orders that set a price floor that dairy handlers must pay to producers. *Block*, 467 U.S. at 341–42. The statute's review scheme only allowed diary handlers (*i.e.*, parties forced to pay the price set by the Secretary) to challenge milk market orders and lacked a general judicial review provision. *Id.* at 346. Consumers (end-users of the milk product) challenged a particular milk market order under the APA. *Id.* at 344. The Supreme Court held the consumers' suit was barred because Congress established a "complex and delicate administrative scheme" only permitting dairy handlers to contest milk market orders. *Id.* at 348. Allowing consumers to sue would frustrate that clear purpose. *Id.* at 347–48.

This case is different because the States are not challenging discrete removal orders. Sections 1226(e), 1231(h), and 1252(b)(9) all seek organize judicial review of removal orders. *See St. Cyr*, 533 U.S. at 513–14; *J.E.F.M.*, 837 F.3d at 1031. Unlike the dairy consumers who wanted to challenge milk market orders as if they were handlers, the States here contest a general immigration enforcement policy unrelated to the individual removal orders covered by INA's judicial review provisions. *See Preap*, 139 S. Ct. at 962.

The Court must now assess whether the Permanent Guidance is "final" agency action.

3. Final Agency Action

Only "final" agency action is subject to judicial review under the APA. 5 U.S.C. § 704. Two conditions make for a "final" agency action. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corp. of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 597 (2016) (quoting *Bennett*, 520 U.S. at 177–78). DHS concedes that the Permanent

Guidance "mark[s] the consummation" of its decision making process. Doc. No. 29 at PageID 713. The Court will, therefore, focus on *Bennett*'s second prong.

Hawkes instructs courts to consider the "pragmatic" consequences of agency action to determine finality. 578 U.S. at 599 (quoting *Abbott Laboratories*, 387 U.S. at 149). "The underlying rationale of the Supreme Court's 'pragmatic' approach to finality is to prevent unnecessary judicial intervention into agency proceedings." *Berry v. U.S. Dep't of Lab.*, 832 F.3d 627, 634 (6th Cir. 2016) (first quoting *Abbott Laboratories*, 378 U.S. at 149–52; and then citing *Ciba-Geigy Corp. v. E.P.A*, 801 F.2d 430, 436 (D.C. Cir. 1986)). Final agency action must have a "'sufficiently direct and immediate' impact on the aggrieved party." *Id.* at 633 (quoting *Abbott Laboratories*, 378 U.S. at 152).

DHS argues that the Permanent Guidance is not final agency action because it "does not alter any person or entity's legal rights or obligations." Doc. No. 29 at PageID 713. DHS points to Section VII of the Permanent Guidance stating, "This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural." Doc. No. 4-1 at PageID 104. DHS insists that the Permanent Guidance lacks legal effect because it does not compel its officers to take any enforcement action or alter the criteria for non-citizen removability. Doc. No. 29 at PageID 714.

DHS also contends that any harm incurred by the States because of the Permanent Guidance does not make the agency action final. *Id.* (citing *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162 (6th Cir. 2017)). Its view is that any state expenditure made on or to non-citizens is independent of the Permanent Guidance. *Id.* This, DHS argues, does not mean the Permanent Guidance has a legal effect. *Id.* The Court disagrees on both counts.

First, noncitizens. As explained above, the Permanent Guidance displaces the statutory custody and removal factors set forth in 8 U.S.C. §§ 1226(c) and 1231. *See supra* § III(B)(1)(c). Changing the standards by which agency decisions are made constitutes a legal effect. *See, e.g.*, *Barrios Garcia*, 25 F.4th at 441 n.3 (observing agency action was final when it began adjudicating visa applications under a new policy). Under the Permanent Guidance, § 1226(c) custody determinations must now be made using a totality-of-the-circumstances approach, not the categorical analysis Congress instructed DHS to apply. *Cf. Nat. Res. Def. Council v. E.P.A.*, 643 F.3d 311, 320 (D.C. Cir. 2011) (explaining agency action was final when it "altered the legal regime" and bound the policy's administrators). Same with § 1231. ERO officials may use the Permanent Guidance to make non-removal decisions for reasons outside the parameters of the removal statute. Section VII's boilerplate language notwithstanding, *see Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (assigning little weight to disclaimer in an agency policy stating, "The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party"), the Permanent Guidance changes the criteria for non-citizen custody and removal decisions.

The Permanent Guidance has more than just an incidental effect on the States. DHS and the States engage in an immigration cost-sharing partnership. Doc. No. 1 at PageID 9–15; *see also Texas*, 2021 WL 3683913, at *25 (finding states must devote more Emergency Medicaid resources to non-citizens when detentions and removals decline); *Arizona*, 2021 WL 2787930, at *7 (finding that Arizona incurred community supervision cost on non-citizens whose detainers were lifted). Each commits resources to non-citizens whether for care and education or through criminal justice and immigration enforcement administration. Doc. No. 1 at PageID 9–15. The States established that they are subject to a mandatory duty to make education and healthcare expenditures on non-

citizens. *Id.* Their law enforcement agencies support DHS's mission by identifying, and detaining, non-citizens who committed crimes in their jurisdictions. *See supra* § I(B). DHS cannot so easily dismiss how its administration of the immigration laws impacts the States considering that Congress enacted § 1226(c) in response to high rates of non-citizen abscondment and strain on state resources. *Demore*, 538 U.S. at 518 ("Congress adopted [§ 1226(c)] against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens. . . . Criminal aliens . . . formed a rapidly rising share of state prison populations as well"). A decline in non-citizens detained or removed by DHS shifts a corresponding cost to the States. Doc. No. 4 at PageID 72–74; Doc. Nos. 4-8, 4-9.

DHS's citation to *Parsons* is unavailing. There, the Department of Justice ("DOJ") named fans of a music group called "Juggalos" "a loosely-organized hybrid gang" in an annual report. 878 F.3d at 165. A group of Juggalos sued the DOJ to retract the designation after state and local law enforcement detained them suspecting they were criminal gang members. *Id.* at 166. But the Sixth Circuit concluded that the DOJ's report was not final agency action because it did not commit the agency to take any action against the plaintiffs. *Id.* at 168. The court explained that actions taken by unrelated third-party law enforcement agencies "[were] not direct consequences of the [r]eport." *Id.* (quoting *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. Env't Prot. Agency*, 313 F.3d 852, 860 (4th Cir. 2002)). "[I]ndependent actions taken by third parties" in response to agency action cannot be "legal consequences." *Id.* (quoting *Flue-Cured Tobacco*, 313 F.3d at 860).

Here the States have drawn a direct line between DHS's action and their harm. Doc. No. 1 at PageID 9–15. No intermediary is involved. *Id.* *Parsons* turned on the DOJ's relative responsibility for the third-party law enforcement agents who acted in response to its report. 878

F.3d at 168. DOJ's action was not the immediate cause of the harm. *Id.* The States have shown here that they are harmed when DHS adopts a policy that results in fewer non-citizens being detained and removed. Doc. No. 1 at PageID 9–15. Accordingly, the Court finds the Permanent Guidance is final agency action.

4. Zone of Interests

A final threshold barrier remains for the States. APA plaintiffs must demonstrate the "interest [they] assert [is] . . . 'arguably within the zone of interests to be protected or regulated by the statute'" alleged to be violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). "Whether a plaintiff comes within the 'zone of interests' is an issue . . . determine[d] using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (citations omitted). Courts "apply the test in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). The Supreme Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff.'" *Id.* For that reason, the zone of interests test "is not meant to be especially demanding." *Id.* (quoting *Clarke*, 479 U.S. at 399).

DHS contends the States fail this test and, in particular, points to 8 U.S.C. § 1231(h) to show why. Doc. No. 29 at PageID 719–20. Section 1231(h) provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h). DHS reads this subsection as Congress's way of ensuring that "no entity can enforce," or claim a valid interest under, § 1231. Doc. No. 29 at PageID 720.

But as the States point out, the Supreme Court has instructed lower courts to avoid narrowly focusing on fragments of a statute to determine whether a litigant has an interest to be vindicated. Doc. No. 34 at PageID 912 (citing *Clarke*, 479 U.S. at 401). Instead, the Court must look at a particular statute within the "overall context" of the whole law. *See Clarke*, 479 U.S. at 401. This is in part to avoid conflating the zone of interests test with the more rigorous private-right-of-action examination. *See Lexmark*, 572 U.S. at 127; *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Courts do not require any "indication of congressional purpose to benefit the would-be plaintiff." *Match-E-Be-Nash*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399).

Congress had the states in mind when enacting §§ 1226(c) and 1231. *See, e.g.*, *Demore*, 538 U.S. at 518. Both provisions were designed, *inter alia*, to strengthen the federal immigration detention and removal system to aid the states. *Id.* at 518–19. Congress found that noncitizens—particularly those who were convicted of a crime—absconded at high rates during their removal proceedings and often committed additional offenses. *Id*. at 519 ("Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings" (citing S. Rep. 104-48, at 2). As the States show here, they must expend more criminal justice resources on non-citizens when federal immigration detentions and removals decline. Doc. No. 1 at PageID 9–15. The States depend on the federal government to defray the costs of unlawful immigration because they cannot enforce the immigration laws themselves. *See Arizona*, 567 U.S. at 397 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States"). This Article III injury is sufficient to demonstrate the States are within the INA's zone of interests. *Cf. DAPA*, 809 F.3d at 163 (concluding that Texas satisfied the zone of interests test under the INA "as a result of the same injury that gives it Article III standing").

5. Conclusion

The Court finds that the Permanent Guidance is subject to judicial review under the APA. Onto the merits.

IV. Preliminary Injunction

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet*, 305 F.3d at 573 (citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). The district judge "is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (citation omitted). But, if an injunction should issue, the district court must make a specific finding of irreparable harm. *See D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019) ("[T]his circuit has held that a district court abuses its discretion 'when it grants a preliminary injunction without making specific findings of irreparable injury'" (quoting *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982))).

A. Likelihood of Success on the Merits

1. Count I: Contrary to Law

As explained above, *supra* § III(B)(1)(c), the Permanent Guidance is unlawful for two reasons. First, it displaces § 1226(c)'s mandate that "criminal aliens" are to be detained based on the nature of their convictions pending their removal proceedings for a balancing test based on factors Congress did not intend for it to consider. Second, DHS authorizes ERO officials to make removal decisions under the Permanent Guidance's balancing test and, in effect, introduces a non-statutory exception to § 1231. Little else need be said. There is a strong likelihood the States prevail on their Count I. Doc. No. 1 at PageID 15.

2. Count II: Arbitrary and Capricious

"The APA directs courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)). A decision is arbitrary or capricious under the APA if the agency

> has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

Arbitrary and capricious review is "'narrow': [the Court] determine[s] only whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Com.*, 139 S. Ct. at 2569 (quoting *State Farm*, 463 U.S. at 43). "Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce." *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998) (citations omitted). "A court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com.*, 139 S. Ct. at 2573 (first citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978); and then citing *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)). "[Courts] will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Home Builders*, 551 U.S. at 658 (quoting *State Farm*, 463 U.S. at 63). "[T]he role of courts in reviewing arbitrary and capricious challenges is to 'simply ensur[e] that the agency has acted within a zone of reasonableness.'" *Biden v. Missouri*,

--- U.S. ---, 142 S. Ct. 647, 654 (2022) (quoting *F.C.C. v. Prometheus Radio Project*, --- U. S. ---,141 S. Ct. 1150, 1158 (2021)).

The States advance several reasons why DHS acted arbitrarily in adopting the Permanent Guidance. Doc. No. 4 at PageID 78–83. Their complaints can be divided into two groups: failure to consider important factors and failure to offer a reasoned explanation. *Id.*; Doc. No. 34 at PageID 883–86. The States identify three factors they say DHS gave insufficient attention to: criminal alien recidivism; the relationship between mandatory detention and successful removals; and costs imposed on the States. Doc. No. 4 at PageID 78–83. They also believe DHS's resource constraint rationale is really a pretext to reduce detentions and removals. Doc. No. 34 at PageID 883–86.

DHS disputes each charge. Doc. No. 29 at PageID 724–29; Doc. No. 38 at PageID 983–989. It contends that the Considerations Memo addressed, and resolved, each of the States' concerns. Doc. No. 29 at PageID 726. DHS found that noncitizens, as compared to U.S. citizens and legal immigrants, have a lower propensity to commit crime. *Id.*; Doc. No. 27-2 at PageID 455. Its view is that Congress's definition of "aggravated felony" is a poor proxy to determine which criminal noncitizens are likely to reoffend. Doc. No. 27-2 at PageID 455. Instead, DHS believes that a totality of the circumstances approach better identifies recidivist risks. *Id.* While DHS acknowledged that states incur some "second-order effects" from its immigration enforcement decisions, it concluded that such costs are marginal at best considering the off-setting benefits of immigration. *Id.* at PageID 456. DHS contends that, considering the agency's resource constraints, prioritizing the most serious offenders for apprehension and removal is a reasonable policy decision. Doc. No. 38 at PageID 986.

The Court will review the arguments in turn.

a. Failure to Consider Important Aspects of the Problem

In its order enjoining the Interim Guidance, the Texas district court faulted DHS for failing to consider criminal alien recidivism, costs imposed on the states, and how the decline in detentions could frustrate removals. *Texas*, 2021 WL 3683913, at *48–51. DHS drafted the Considerations Memo with these critiques in mind. Doc. No. 27-2 at PageID 452. It now uses the Considerations Memo in this litigation to show how it evaluated each of the factors flagged by the Texas district court. *Id.*; Doc. No. 29 at PageID 724–29. On closer review, however, the Considerations Memo sidesteps the issues raised by the Texas district court and still does not "reasonably explain" its policy shift. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) ("[W]hen [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy[,] . . . a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" (citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996))).

i. Recidivism

Congress recognized that criminal alien abscondment and recidivism are serious problems. *See Demore*, 538 U.S. at 518 ("Congress adopted [§ 1226(c)] against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens"); *supra* § I(A). Prior to enactment of § 1226(c), "20% of deportable criminal aliens failed to appear for their removal hearings." *Demore*, 538 U.S. at 519 (citing S. Rep. 104-48, at 23). Another study preceding the IIRIRA found that 77% of noncitizens identified as criminal aliens were arrested more than once before their removal proceedings began, while 45% were arrested multiple times. *Id.* at 518. Section 1226(c)'s mandatory detention program was meant to offload from the states to the federal government the rising cost of detaining criminal aliens and expedite the removal process. *Id.* at 518–20. Implicit was the understanding that criminal alien recidivism imposed a cost on

communities throughout the country. S. Rep. No. 104-48, at 7, 9. Mandatory detention of criminal aliens was Congress's solution. *See Demore*, 538 U.S. at 519.

Under the Interim Guidance, noncitizens convicted of an "aggravated felony" were priority targets if they presented a public safety risk. Doc. No. 27-10 at PageID 515. The Texas district court observed that this meant noncitizens were only prioritized if they committed an aggravated felony and were a public safety risk. *Texas*, 2021 WL 3683913, at *47. This, the court found, ignored the Supreme Court's recognition that "all criminal illegal aliens or 'deportable aliens pose high risks of recidivism.'" *Id.* (emphasis omitted) (quoting *Demore*, 538 U.S. at 518). DHS did not explain why it thought criminal aliens who had not been convicted of an aggravated felony were less likely to recidivate, and why this justified deprioritization. *Id.* The Texas district court therefore found that the Interim Guidance gave no consideration to the recidivist risk presented by criminal aliens. *Id.*

DHS attempts to address that criticism by removing the "aggravated felony" criteria from the public safety analysis. Doc. No. 27-2 at PageID 454 ("The updated guidance addresses the district court's concern by calling for a context-specific consideration of aggravating and mitigating factors, the seriousness of an individual's criminal record, the length of time since the offense, and evidence of rehabilitation"). It argues that by allowing ERO officials to consider a variety of aggravating and mitigating factors, they can better identify, and target, noncitizens who truly present a public safety risk. *Id.* That analysis, DHS submits, addresses any recidivism concerns and shows it did consider recidivism when drafting the Permanent Guidance. *Id.* ("These factors are to be weighed in each case to assess whether a noncitizen poses a current threat to public safety, including through a meaningful risk of recidivism").

But that conclusion does not follow from, and is contradicted by, the explanations offered in the Considerations Memo. *Id.* at PageID 453–55. First, DHS stated that it removed "aggravated felony" from the public safety analysis because stakeholders felt the definition was hard to apply. *Id.* at PageID 454. Second, DHS concluded that recidivism should not factor into a public safety analysis based on findings that undocumented immigrants commit crimes at a lower rate than U.S. citizens and legal immigrants. *Id.* at PageID 455.

DHS's "internal and external stakeholders . . . raised concerns about whether the focus on individuals convicted of 'aggravated felonies' was both over- and under-inclusive." *Id.* at PageID 454. The phrase could include crimes like filing a false tax return, while excluding more serious crimes like murder and sexual assault depending on how the state statute was written. *Id.* Therefore, DHS explained, it removed "aggravated felony" from the public safety analysis to avoid this problem. *Id.*

This reason has nothing to do with criminal alien recidivism. All it shows is that DHS concluded its officers were bogged down by how a crime was defined at the expense of the other public safety factors. *Id.* at PageID 454. Efficiency, not predictiveness of recidivism, motivated this change. *Id.* Omitting "aggravated felony" from the public safety factors makes it less likely that recidivism is considered in the public safety analysis. The Interim Guidance's inclusion of "aggravated felony" at least captured a subset of criminal aliens Congress considered to be recidivist risks. *See Texas*, 2021 WL 3683913, at *47; *see also, e.g.*, *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) ("The risk to the community posed by the mandatory release of aliens who are dangerous or a flight risk is far from insubstantial; the motivation to protect the citizenry from aliens determined to be dangerous is central to the immigration power itself"). Now without that anchor, the public safety analysis is open-ended and farther astray from the factors Congress

instructed DHS to apply. *Cf. Huisha-Huisha v. Mayorkas*, --- F.4th ---, 2022 WL 628061, at *2 (D.C. Cir. Mar. 4, 2022) (explaining that although the Executive wields "considerable authority over immigration[,] . . . Congress has sometimes limited executive discretion in such ways").

DHS also argues it considered recidivism by citing to a study comparing crime rates by citizenship. Doc. No. 27-2 at PageID 455 (citing Michael T. Light et al., *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born U.S. Citizens in Texas*, Proceedings of the Nat'l Academy of the Sciences (Dec. 12, 2020)). This study concluded that undocumented immigrants in Texas commit crimes at a far lower rate than legal immigrants and U.S. Citizens. Doc. No. 27-29 at PageID 580. That finding was true across all types of crimes. *Id.* at PageID 580–81. DHS contends the study proves the Texas district court's concerns about recidivism were unfounded. Doc. No. 27-2 at PageID 455.

Valid as the study's conclusions may be, DHS misses the point. The Texas district court, the States here, and Congress were all concerned about *criminal alien* recidivism, not noncitizen crime rates generally. Doc. No. 34 at PageID 887–88; *Demore*, 538 U.S. at 520–21; *Texas*, 2021 WL 3683913, at *47. DHS cannot rely on this study to show it considered criminal alien recidivism in drafting the Permanent Guidance.

The study itself compares crimes rates among *total* populations of undocumented immigrants, legal immigrants, and U.S. citizens. Doc. No. 27-29 at PageID 580. The authors, however, do not analyze repeat criminal offender rates among the three populations. *Id.* Nor do the authors indicate that total population crime rates are predictive of recidivism rates. Doc. No. 27-29. It was thus unreasonable for DHS to extrapolate the study's conclusions about total population crime rate to criminal alien recidivist rates. *Cf. Michigan v. E.P.A.*, 576 U.S. 743, 750

(2015) ("[T]he process by which [the agency] reaches [its] result must be logical and rational" (quoting *Allentown Mack*, 522 U.S. at 374)).

DHS's explanation is also undone by its own finding that criminal aliens to present a recidivism risk. A 2019 ICE enforcement and removals report determined that

> Of the 123,128 ERO administrative arrests in FY 2019 with criminal convictions or pending criminal charges, the criminal history for this group represented 489,063 total criminal convictions and pending charges as of the date of arrest, which equates to an average of four criminal arrests/convictions per alien, *highlighting the recidivist nature of the aliens that ICE arrests*.

U.S. Immigration & Customs Enforcement, *Fiscal Year 2019 Enforcement and Removal Operations Report* 12 (2020) ("2019 ICE Report") (emphasis added). DHS's approach to criminal alien recidivism has undergone a significant shift between ICE's observations in 2019 and the Consideration Memo. Not providing a "reasoned explanation" for how it arrived at its updated view is arbitrary and capricious. *Fox Television Stations*, 556 U.S. at 515–16 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. . . . [W]hen, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy . . . a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy"); *State Farm*, 463 U.S. at 57 ("[A]n agency changing its course must supply a reasoned analysis" (quoting *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1971))).

Neither proffered explanation shows DHS considered criminal alien recidivism when drafting the Permanent Guidance. Doc. No. 27-2 at PageID 444–45. DHS has failed to "consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

ii. Cost to the States

"The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. [They] bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. Immigration "ha[s] a discernable impact on traditional state concerns," considering that "unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982).

Immigration policy continues to impact the states. In *Regents*, the Supreme Court faulted DHS for not considering how rescinding DACA would cost States tax revenue. 140 S. Ct. at 1914. The DAPA litigation in the Fifth Circuit showed that DHS must also consider the drain on state resources when adopting a policy that makes noncitizens newly eligible for benefits. *DAPA*, 809 F.3d at 180–81. More recently, the Fifth Circuit vacated DHS's termination of its MPP program in part because the agency did not adequately consider the decision's financial impact on Texas. *MPP*, 20 F.4th at 968–69, 990 ("[T]he Government responds that DHS had no obligation to consider the States' reliance interests at all. Yet again, that 'contention is squarely foreclosed by *Regents*'" (quoting *Texas v. Biden*, 10 F.4th 538, 553 (5th Cir. 2021))).

The Texas district court, in the Interim Guidance litigation, determined that DHS gave no consideration to how the States were affected by its policy. *Texas*, 2021 WL 3683913, at *49–50. It faulted DHS for providing no "relevant data" to show how its prioritization scheme would improve public safety and conserve criminal justice resources. *Id.* at *49.

DHS responded to those criticisms in the Considerations Memo. Doc. No. 27-2 at PageID 456. While it acknowledged that the states might experience some fiscal effect from a change in its enforcement policies, any such impact would be "marginal" and "downstream." *Id.* at PageID 457–58. DHS explained that "it is challenging" to measure the effect its policies have on state

budgets due to the myriad of variables at play. *Id.* at 457. Part of any change is due to "decisions that state and local governments are themselves making." *Id.* Any costs, DHS opined, might even be offset by positive effects of immigration, such as greater labor force participation and tax contribution. *Id.* Despite some cost to the states, DHS concluded that they are outweighed by the benefits of a prioritization scheme. *Id.* at PageID 458.

DHS again examined the problem at a general level when specifics were demanded. The States have shown that their criminal justice expenditures increase when DHS's detention and removal of noncitizens decrease. Doc. No. 1 at PageID 9–15; Doc. No. 34 at PageID 895–902. This push-pull relationship is not new, as *Regents* and the DAPA and MPP litigations demonstrate. The states play an essential role in identifying removable noncitizens by investigating and prosecuting state crimes. *See* 8 C.F.R. § 287.7. DHS relies on the states to honor detainer requests so it can take custody of its enforcement targets. *See* Ice Detainer Policy, at 3.

DHS only considered whether its enforcement policies generally influence state expenditures. Doc. No. 27-2 at PageID 458. It gave no explanation of how its policy—that relaxes mandatory detention standards set by Congress—might increase state criminal justice expenses. *Id.* For that reason, DHS "entirely failed to consider" an important consequence of its policy. *State Farm*, 463 U.S. at 43.

b. Failure to Offer Reasoned Explanation

"The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Com.*, 139 S. Ct. at 2575–76. An agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Fox Television Stations*, 556 U.S. at 513 (quoting *State Farm*, 463 U.S. at 43).

DHS cites resource constraints as the principal rationale for the Permanent Guidance. Doc. No. 27-2 at PageID 447–48, 459. It explains that its removal docket has ballooned by over 400% since 2010. *Id.* at PageID 448. Over 3 million noncitizens are in removal proceedings or have final orders of removal, but there are only 6,500 ERO officers available to manage those cases. *Id.* DHS only has the capacity to detain about 26,800 noncitizens—or 1% of noncitizens in removal proceedings—at any given time. *Id.*

Prioritization, in DHS's view, is the best way to allocate its resources. *Id.* at PageID 459. It also believes it leads to more efficient enforcement outcomes. *Id.* For instance, between February and August 31, 2021, while the Interim Guidance was effective, DHS detained 6,046 noncitizens who committed aggravated felonies compared to just 3,575 during that same period in 2020. *Id.*

Taking DHS's resource constraints at face value, that justification does not explain why it was necessary for DHS to relax the mandatory detention standards that Congress instructed it to apply. 8 U.S.C. §§ 1226(c) and 1231(a)(2). The Considerations Memo only mentions total detention capacity. Doc. No. 27-2 at PageID 448. It does not suggest that DHS is taking in more noncitizens subject to § 1226(c) mandatory detention than it can house. *Id.*

Based on DHS's representations, it seems the opposite is true: DHS has residual capacity to detain more criminal aliens under the Permanent Guidance. ICE detentions have steadily declined since the onset of the COVID-19 pandemic, falling from a high of 19,174 detained noncitizens in March 2020 to 4,844 as of March 2022.[17] Since the Permanent Guidance went into

[17] U.S. Immigration & Customs Enforcement, *FY 2022 ICE Statistics*, Tab 3 (last visited Mar. 21, 2022), https://www.ice.gov/detain/detention-management (hereinafter "FY 2022 ICE Statistics"); U.S. Immigration & Customs Enforcement, *FY 2020 Ice Statistics*, Tab 3, https://www.ice.gov/detain/detention-management (last visited Mar. 21, 2022). Court orders requiring ICE to maintain stricter detention standards to comply with COVID-19 safety protocols were responsible for some of the decline in

effect, ICE has detained, per month and on average, 3,980 noncitizens with a criminal conviction, 611 noncitizens pending criminal charges, and 241 noncitizens with no criminal record.[18] This shows DHS was not under such a resource crunch that it needed to relax the mandatory detention standard.

Nor does DHS's claim that it apprehended more aggravated felons with the Interim Guidance than without it explain why departure from the § 1226(c) standard was warranted. If anything, it suggests that under the Permanent Guidance there will be an uptick of enforcement proceedings brought against criminal aliens. Doc. No. 27-2 at PageID 459. It was paradoxical for DHS, on one hand, to claim resource constraints prevented it from detaining more criminal aliens, but, on the other, insist that an increase in criminal alien apprehension showed its prioritization scheme is effective. *See State Farm*, 463 U.S. at 43 (noting a rule is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before [it]").

There is also a significant "mismatch" between the Considerations Memo's discussion of §§ 1226(c) and 1231(a)(2) mandatory detentions and the Permanent Guidance. *Dep't of Com.*, 139 S. Ct. at 2575. The Secretary "recognized that [8 U.S.C. §§ 1226(c)(1) and 1231(a)(2)] place constraints on [DHS's] authority to release noncitizens from ICE custody while the Department is pursuing their removal or during the statutory removal period." Doc. No. 27-2 at PageID 460. He explained that the Permanent Guidance is "fully consistent" with these provisions and does "not purport to override them." *Id.* at PageID 461. But, as explained above, the Permanent Guidance neither makes such a disclaimer nor includes any such carveout. Doc. No. 4-1 at PageID 100

---

detentions. *See Fraihat v. U.S. Customs & Immigration Enf't*, 445 F. Supp. 3d 709, 751 (C.D. Cal. 2020), *rev'd and remanded by* 16 F.4th 613 (9th Cir. 2021).

[18] FY 2022 ICE Statistics, Tab 3. DHS subdivides its detained population between those in Customs and Border Patrol and ICE custody. *Id.* ICE detention data reflects interior (as opposed to border) enforcement and removal and necessarily includes noncitizens in ICE custody that have committed a state crime. *Id.*

(applying through "apprehension and removal"); *id.* at PageID 104 ("This guidance is Department-wide. Agency leaders as to whom this guidance is relevant to their operations *will implement* this guidance accordingly" (emphasis added)). DHS's position is that the Permanent Guidance reflects DHS's discretion at all steps of the removal process. Doc. No. 29 at PageID 725. Neither the Permanent Guidance nor its predecessor policies indicate there are phases of the removal process where its directions do not apply. Doc. No. 4-1 at PageID 100, 104; Doc. No. 27-9 at PageID 507; Doc. No. 27-10 at PageID 512. Offering a belated rationale cannot remedy the Permanent Guidance's deficiencies.

There is a strong likelihood the States will prevail on their Count II. Doc. No. 1 at PageID 17.

3. Count III: Notice and Comment

Agencies have the choice to act either through adjudication or rulemaking. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 201–02 (1947). When an agency intends to make a rule—that is, "an agency statement of general or particular applicability and future effect," 5 U.S.C. § 551(4)—it must follow the procedures set forth by 5 U.S.C. § 553. Generally, a rule may only be promulgated after the agency engages in notice-and-comment. 5 U.S.C. § 553(b).[19] Rules necessitating notice-and-comment are called legislative rules. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law'" (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979))). But "interpretative rules" and "general statements

[19] Notice-and-comment rulemaking requires that, before a rule can have a binding legal effect, the agency "shall" publish notice of the proposed rulemaking in the Federal Register, justify the rule under legal authority, and adequately describe "terms or substance of the proposed rule or a description of the subjects and issues involved" to give the public an opportunity to weigh in before final adoption. 5 U.S.C. § 553(b).

of policy" are exempted from the APA's notice-and-comment requirement. 5 U.S.C. § 553(b)(A); *see, e.g.*, *Kisor v. Wilkie*, --- U.S. ---, 139 S. Ct. 2400, 2420 (2019).

Determining when an agency has adopted a legislative rule, an interpretative rule, or general statement of policy is a consideration filled with considerable "smog." *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975). This case is no different. Indeed, the States contend the Permanent Guidance's "substantive effect," especially that borne by the States in the form of additional public expenditures, makes it a legislative rule. Doc. No. 34 at PageID 893. DHS emphasizes that its lack of binding, legal effect means it is a general statement of policy exempt from notice-and-comment. Doc. No. 29 at PageID 730–31.

Defining the two types of agency action will help.[20] "For one, legislative rules have the 'force and effect of law,'" *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (quoting *Perez*, 575 U.S. at 96), and policy statements do not, *Dyer v. Sec'y Health & Hum. Servs.*, 889 F.2d 682, 685 (6th Cir. 1989). "Legislative rules impose new rights or duties and change the legal status of regulated parties; interpretive rules articulate what an agency thinks a statute means or remind parties of pre-existing duties." *Mann Constr., Inc. v. United States*, --- F.4th ---, 2022 WL 619822, at *3 (6th Cir. Mar. 3, 2022) (citing *Tenn. Hosp. Ass'n*, 908 F.3d 1042). "An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.). "A statement is also likely to be considered binding if it narrowly

[20] The Permanent Guidance does not purport to "advise the public of the agency's construction" of the immigration statutes and, therefore, cannot be classified as an interpretative rule. *See, e.g.*, *Perez*, 575 U.S. at 96–97 ("[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers'" (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995))).

circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates." *Dyer*, 889 F.2d at 685 (citing *Cleveland Cliffs Iron Co. v. Interstate Com. Comm'n*, 664 F.2d 568, 575 (6th Cir. 1981)). "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy." *Golden Living Ctr.—Mtn. View v. Sec'y Health & Hum. Servs.*, 832 F. App'x. 967, 973 (6th Cir. 2020) (quoting *Nat'l Min. Ass'n*, 758 F.3d at 252); *see also Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (describing general statements of policy as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power" (quoting *Chrysler*, 441 U.S. at 302 n.31)).

Courts focus on several factors to differentiate legislative rules and general statements of policy. "The most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Min. Ass'n*, 758 F.3d at 252 (citations omitted). Agency action that establishes a "binding norm" on regulated parties or the agency "determinative of the issues or rights to which it is addressed" is a legislative rule. *CropLife Am. v. E.P.A.*, 329 F.3d 876, 881 (D.C. Cir. 2003) (citations omitted) (observing that an agency press release that "reflect[ed] an obvious change in established agency practice, creates a 'binding norm'" and was a legislative rule); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (concluding that an agency policy that imposed obligations and limited its enforcement discretion was a legislative rule). How the agency characterizes the document matters too. *See, e.g.*, *S. Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 972–73 (6th Cir. 2016) (explaining that although an agency's internal operations manual used "mandatory language," it was only intended to assist agency

personnel administer the law, "not to create additional obligations beyond the statutory mandates").

The States contend that the Permanent Guidance has a two-pronged legal effect: (1) it subjects noncitizens to a relaxed detention and removal standard and (2) it binds DHS officials to follow the policy instead of the text of the detention and removal statutes. Doc. No. 4 at PageID 83–88; Doc. No. 34 at PageID 891–94. The States think this unwinds Congress's express mandate in 8 U.S.C. §§ 1226(c) and 1231(a). Doc. No. 4 at PageID 87. No longer will criminal aliens be detained based on the nature of their conviction, 8 U.S.C. § 1226(c)(1), removed within 90 days absent application of an express exception, 8 U.S.C. § 1231(a)(1)(A), or detained during the removal period, 8 U.S.C. § 1231(a)(2). Doc. No. 4 at PageID 87. DHS officials now must make those detention and removal decisions using the Permanent Guidance's balancing test. *Id.*

DHS focuses on the Permanent Guidance's text. Doc. No. 29 at PageID 732. It points out that the Permanent Guidance specifically states that "this guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." *Id.* (quoting Doc. No. 4-1 at PageID 104). Moreover, DHS emphasizes that the Permanent Guidance only purports to guide its officials' congressionally delegated discretion. *Id.* at PageID 730.

The States, in the Court's view, have it right. DHS established a "binding norm" on both noncitizens and its officials by displacing the detention and removal standards set forth by Congress. *CropLife*, 329 F.3d at 881; *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (An agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted" (internal quotation marks omitted) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988))). No longer will criminal aliens face

mandatory detention pending their removal only based on whether they committed a crime referenced in 8 U.S.C. § 1226(c)(1). Doc. No. 4-1 at PageID 100–01. Noncitizens with final orders of removal could be released under supervision pending execution of their removal order based on factors outside 8 U.S.C. § 1231. *Id.* For noncitizens subject to mandatory detention pending their removal under 8 U.S.C. § 1231(a)(2), they could be given supervised release pending execution of their removal order thanks to the Permanent Guidance. *Id.*

DHS relies on the Permanent Guidance's disclaimer that the policy does not prohibit nor compel agency officials to take a particular action. Doc. No. 4-1 at PageID 102 ("The civil immigration enforcement guidance does not compel an action to be taken or not taken. Instead, the guidance leaves the exercise of prosecutorial discretion to the judgment of our personnel"). The implication is that ERO officials could revert to the statutory detention and removal tests and ignore the Permanent Guidance. Doc. No. 38 at PageID 991. But whether a policy "genuinely [leaves] the agency and its decision-makers free to exercise discretion[,]" *Ctr. for Auto Safety v. N.H.T.S.A.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (quoting *CropLife*, 329 F.3d at 883), or is "applied by the agency in a way that indicates it is binding," *Gen. Elec. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citation omitted), makes all the difference.

In *DAPA*, DHS argued that the program was a general statement of policy because, on its face, it stated that application reviewers were free to exercise their discretion. 809 F.3d at 171–72. The district court found, and the Fifth Circuit agreed, that this statement rang hollow. *Id.* at 172. DAPA administrators were compelled to follow a step-by-step review process that nearly always resulted in approval. *Id.* at 172–75. The Fifth Circuit observed that a policy can still introduce a binding norm despite discretion-preserving language. *Id.* at 171–72.

So too with the Permanent Guidance. Examine the language of the public safety balancing test. Doc. No. 4-1 at PageID 100–01. The Secretary explains that "our personnel *must* evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." *Id.* at PageID 101 (emphasis added). He adds that "personnel should not rely on the fact of conviction or the result of a database search alone." *Id.* Section VI—entitled "Implementation of Guidance"—reads, "This guidance is Department-wide. Agency leaders as to whom this guidance is relevant to their operations *will implement* this guidance accordingly." *Id.* at PageID 104 (emphasis added). Compliance does not appear optional.

Practically too ERO officials must follow the Permanent Guidance instead of the statutory mandates. Section 1226(c) mandatory detention only requires a determination based on the nature of the noncitizen's conviction. 8 U.S.C. § 1226(c)(1). A noncitizen subject to mandatory detention pending removal their proceeding can appeal that decision to an immigration judge. *See, e.g.*, *Jennings*, 138 S. Ct. at 838 n.1. But the scope of the immigration judge's review is limited. He or she looks to whether the noncitizens committed an offense cross-referenced in § 1226(c)(1). *See In re Joseph*, 22 I. & N. Dec. at 802 (explaining that immigration judges do not have jurisdiction to make custody or bond decisions but can determine whether the noncitizen is covered by "regulatory provisions which would deprive the Immigration Judge of bond jurisdiction"). Does the immigration judge now have to apply the Permanent Guidance during *Joseph* hearings? Do ERO officials now have to amplify their reasoning for mandatory detention? *See* 8 C.F.R. § 236.1(g) (noting that issuance of a Notice of Custody Determination, Form I-286, is optional). The Secretary is silent on consequential, downstream questions like this. He should have, but failed to, promulgate the Permanent Guidance through notice-and-comment. 5 U.S.C. § 553(b).

DHS argues that even if the Permanent Guidance has a binding effect, it is a mere procedural rule and still exempt from notice-and-comment. Doc. No. 29 at PageID 731 (citing 5 U.S.C. § 553(b)(A). "'Procedural rules' . . . are 'primarily directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights [or] interests of affected parties.'" *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980)). The "statutory exception for procedural rules 'was provided to ensure that agencies retain latitude in organizing their internal operations.'" *Nat'l Sec. Couns. v. C.I.A.*, 931 F. Supp. 2d 77, 106 (D.D.C. 2013) (quoting *Batterton*, 648 F.2d at 707).

"The 'critical feature' of a procedural rule 'is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'" *Nat'l Mining Ass'n*, 758 F.3d at 250 (quoting *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000)). "[T]he distinction between substantive and procedural rules is 'one of degree' depending upon 'whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.'" *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.* ("*EPIC*"), 653 F.3d 1, 5–6 (D.C. Cir. 2011) (quoting *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983)). "[T]he exception for procedural rules is narrowly construed and cannot be applied 'where the agency action trenches on substantial private rights and interests.'" *Mendoza*, 754 F.3d at 1023 (first quoting *EPIC*, 653 F.3d at 6; then quoting *Batterton*, 648 F.2d at 708).

What differentiates a substantive rule from a procedural one is even more "murky" than separating legislative rules from interpretative rules and general statements of policy. *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. N.L.R.B.*, 466 F. Supp. 3d 68, 89 (D.D.C. 2020). The Supreme

Court has not directly weighed in on the question but has described procedural rules as agency "housekeeping." *Chrysler*, 441 U.S. at 310. Nor has the Sixth Circuit offered a definition of procedural rule. Among circuit courts that have, there is a difference of opinion between the D.C. and Fifth Circuits. The Fifth Circuit applies a "substantial impact" test focused on whether the rule "modifies substantive rights." *DAPA*, 809 F.3d at 176 ("An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply" (quoting *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984)). The D.C. Circuit has rejected that test in favor of a more functional analysis that asks whether the rule imposes "derivative," "incidental," or "mechanical" burdens upon regulated individuals. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1051 (D.C. Cir. 1987); *see also Kaspar Wire Works, Inc. v. Sec'y of Lab.*, 268 F.3d 1123, 1132 (D.C. Cir. 2001) (noting the D.C. Circuit has "expressly rejected" the Fifth Circuit's substantial impact standard).

What procedural rule test the Court applies is of no importance. The text of the APA resolves this issue. Nonlegislative rules, like interpretative rules, general statements of policy, and procedural rules, are all exceptions to the general requirement that an agency may only adopt rules through notice-and-comment procedures. 5 U.S.C. § 553(b). Because the Court has found the Permanent Guidance is a legislative rule subject to notice and comment, it necessarily cannot be a procedural rule.

There is a strong likelihood the States prevail on their notice-and-comment claim.

B. Remaining Preliminary Injunction Factors

1. Irreparable Harm

The second preliminary injunction factor asks whether the movant "is likely to suffer irreparable harm in the absence of preliminary relief." *Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Sup. Ct.*, 769 F.3d 447, 453 (6th Cir. 2014) (quoting *Winter v. Nat. Res.*

Defense Council, Inc., 555 U.S. 7, 20 (2008)). "To merit a preliminary injunction, an injury 'must be both certain and immediate,' not 'speculative or theoretical.'" *Sumner Cnty. Schs.*, 942 F.3d at 327 (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)). "An injury is irreparable if it is not 'fully compensable by monetary damages.'" *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 852 (6th Cir. 2017) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)).

The States have carried their burden to show irreparable harm. Doc. No. 1 at PageID 9–15; Doc. No. 4 at PageID 93–94; Doc. No. 34 at PageID 914–15. They have demonstrated that they share the cost of immigration enforcement with DHS. Doc. No. 1 at PageID 9–15; Doc. No. 4-14 at PageID 271. When detentions and removals decrease, as they have since the Permanent Guidance became effective, more noncitizens are released into the States' jurisdictions and consume State resources. Doc. No. 1 at PageID 9–15; *see also supra* footnotes 17 & 18 (summarizing ICE detention statistics showing consistent downward trend in removals, particularly since the Permanent Guidance became effective). The States have no choice but to devote expenses to criminal justice, Emergency Medicaid, and education. Doc. No. 1 at PageID 9–15. DHS's displacement of the § 1226(c) mandatory detention standard, in particular, makes it more likely that criminal aliens will be released into the States. ICE observed in 2019 that criminal aliens are likely to recidivate. *See* 2019 ICE Report, at 12. The States directly bear the cost of apprehension, prosecution, and possible incarceration and supervision. *Cf. New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 86 (2d Cir. 2020) (explaining that agency action irreparably harmed State-plaintiffs by reducing Medicaid revenue and federal funding). Because the APA prohibits money damages, 5 U.S.C. § 702, the States are unable recover the increased costs caused by the Permanent Guidance. This factor tips in the States' favor.

2. Balance of the Equities and the Public Interest

The remaining two preliminary injunction elements—balance of the equities and the public interest—merge when the government is a defendant. *See Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). DHS contends that an injunction of the Permanent Guidance would impair the Executive's "historic discretion" to enforce the immigration laws. Doc. No. 29 at PageID 733 (quoting *Texas*, 14 F.4th at 341). An injunction, in its view, would also create inefficiency and confusion in the agency. *Id.* at PageID 734. DHS insists that prioritization has allowed a more orderly allocation of its resources and resulted in more targeted enforcement against the worst offenders. *Id.* It believes an injunction would cause its staff to "ping pong" between different sets of guidances without a clear direction. *Id.*; Doc. No. 27-30 at PageID 592; Doc. No. 27-31 at PageID 602.

DHS has, however, proven capable of adapting its enforcement program to court orders. When the Texas district court issued a restraining order of the January 20 Memo, for example, DHS instructed ERO officials to "return to normal removal operations." Doc. No. 4-4 at PageID 149; Doc. No. 4-17 at PageID 340. Compliance with the law cannot bend to efficiency. While the Executive has substantial authority to enforce the immigration laws, *see Arizona*, 567 U.S. at 396, it must do so within the bounds set by Congress, *see Preap*, 139 S. Ct. at 960.

The public interest favors a lawful application of the immigration laws. As the Supreme Court has explained, "[t]here is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and "permit[s] and prolong[s] a continuing violation of United States law." *Nken*, 556 U.S. at 436 (quoting *AADC*, 525 U.S. at 490). More so, "'the public interest lies in a correct application' of the federal constitutional and statutory provisions upon which the claimants have brought this claim." *Coal. to Def. Affirmative Action v. Granholm*, 473

F.3d 237, 252 (6th Cir. 2006) (quoting *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991)).

Each of the preliminary injunction factors weigh in the States' favor. *Winter*, 555 U.S. at 20. Therefore, the Court will enjoin the Permanent Guidance subject to the limitations set forth in this remainder of this Order.

C. Scope of the Injunction

"Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, --- U.S. ---, 137 S. Ct. 2080, 2087 (2017) (citations omitted). A district court's power to issue a preliminary injunction is drawn from its equitable authority to preserve the status quo among the parties pending a trial on the merits. *See, e.g.*, *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("The Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all suits . . . in equity.' We have long held that "[t]he 'jurisdiction' thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries" (alterations in original) (first quoting § 11, 1 Stat. 78; and then quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939))); *see also* Fed. R. Civ. P. 65(a). Because preliminary injunctions were historically used to cease the defendant's harmful conduct, *see* Samuel L. Bray, *Multiple Chancellors: Reforming the Nationwide Injunction*, 131 Harv. L. Rev. 417, 427 (2017) (explaining that courts at equity took care to ensure injunctions did not affect the rights of nonparties), "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

The States seek a nationwide injunction. Doc. No. 1 at PageID 21; Doc. No. 34 at PageID 896–97. They argue that no less will do because DHS's continued enforcement of the Permanent Guidance in non-Plaintiff States will perpetuate their harm. Doc. No. 34 at PageID 896–97. The States think it illogical to permit DHS to administer an unlawful policy after they demonstrated irreparable harm. *Id.*

Two principles support the States' request. First, the APA requires reviewing courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2). The States have shown there is a strong likelihood they will prove the Permanent Guidance is unlawful. Enjoining the rule pending a merits adjudication ensures that DHS cannot enforce the policy unless and until it has been found lawful. *Cf. Pennsylvania*, 930 F.3d at 575–76 ("[O]ur APA case law suggests that, at the merits stage, courts invalidate—without qualification—unlawful administrative rules as a matter of course, leaving their predecessors in place until the agencies can take further action. . . . [B]y enjoining enforcement of the Rules we provide a basis to ensure that a regulation that the States have shown likely to be proven to be unlawful is not effective until its validity is finally adjudicated" (citations omitted)). A nationwide preliminary injunction prevents administration of a likely unlawful policy.

Immigration law demands uniform application across the country. Congress has instructed that "the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1). The Supreme Court too has described immigration law as a "comprehensive and unified system." *Arizona*, 567 U.S. at 401. For this reason, courts have observed "nationwide injunctions are especially appropriate in the immigration context." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.), *as amended* (June 15, 2017), *vacated and remanded on other grounds sub nom.*, *Trump v.*

Int'l Refugee Assistance, --- U.S. ---, 138 S. Ct. 353 (2017); *see also, e.g.*, *MPP*, 20 F.4th at 1004 (upholding nationwide injunction of DHS's MPP policy); *New York*, 969 F.3d at 88 (recognizing that "the law, as it stands today, permits district courts to enter nationwide injunctions" but limiting an injunction of DHS's public charge rule to the states within its jurisdiction); *Hawai'i v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017) ("Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights"), *rev'd on other grounds*, --- U.S. ---, 138 S. Ct. 2392 (2018); *DAPA*, 809 F.3d at 187–88 (upholding nationwide injunction of DAPA to preserve the uniformity of immigration law).

Nationwide injunctions face significant skepticism, too. Justice Thomas has opined that "[t]he English system of equity did not contemplate universal injunctions," and the remedy cannot trace its roots to any statute or rule of procedure. *See Hawai'i*, 138 S. Ct. at 2426–27 (Thomas, J., concurring). He thinks injunctions may only bind the parties to instant dispute. *Id.* at 2427 ("American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power"). Justice Gorsuch has criticized district courts' use of the equitable remedy as stifling the emergence of differing views among the circuits. *Dep't of Homeland Sec. v. New York*, --- U.S. ---, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more slowly until this Court speaks in a case of its own. But that system encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process" (citing *Hawai'i*, 138 S. Ct. at 2428–29 (Thomas, J., concurring))). That any district judge in the country can enjoin the federal government from acting on a nationwide basis creates an "asymmetric" challenger

advantage. *Id.* at 601 ("If a single successful challenge is enough to stay the challenged rule across the country, the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. A single loss and the policy goes on ice—possibly for good, or just as possibly for some indeterminate period of time until another court jumps in to grant a stay").

A panel of the Sixth Circuit recently voiced the same concerns about nationwide injunctions. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 473–74 (6th Cir.), *vacated on other grounds*, 19 F.4th 890 (6th Cir. 2021) (*en banc*). Though the *Gun Owners* panel left the precise scope of the injunction to the district court on remand, the court instructed that it "may not exceed the bounds of the four states within the Sixth Circuit's jurisdiction and, of course, encompasses the parties themselves." *Id.* at 474. The court recognized that the federal government had prevailed on the same issue in two other circuits and wanted to avoid an "absurd" exercise where the government had to win every case brought against it for its view to prevail. *Id.* Plus, the court had no authority to "overrule the decision of a sister circuit (or for a district court within our circuit to do so)." *Id.* (citing *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1388 (6th Cir. 1996)).

It is against this backdrop that the Court crafts the preliminary injunction here. "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano*, 442 U.S. at 702 (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 414–20 (1977)). An injunction must be tailored to the nature of the conduct established at this stage in the litigation. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, --- U.S. ---, 137 S. Ct. 2080, 2087 (2017) (explaining that a court "need not grant the total relief sought [in a preliminary injunction] by the applicant but may mold its decree to meet the exigencies of the particular case").

Much of the criticism of nationwide injunction concerns their geographical scope. But the Court must keep in mind that an injunction is supposed to prevent the defendant from continuing unlawful conduct while a trial on the merits is held. *See, e.g.*, *Nken*, 556 U.S. at 428. The appropriate scope of an injunction is dictated by the reach of the offending party as much as, if not more so than, the physical location of the injured plaintiff.

DHS's Permanent Guidance applies without respect to state borders. Doc. No. 4-1 at PageID 98. A noncitizen apprehended in one state might be detained in an ICE facility in another state during their removal proceeding. *See, e.g.*, Dora Schriro, U.S. Customs & Immigration Enforcement, *Immigration Detention Overview and Recommendations* 6 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. There is no indication in the record that the Permanent Guidance can be applied on a state-by-state basis. Attempting to make DHS do so would create a patchwork immigration enforcement system. *See Arizona*, 567 U.S. at 401 (describing immigration enforcement as a "comprehensive and unified system")

The Permanent Guidance is directed to all ICE and ERO officials responsible for immigration enforcement across the country. Doc. No. 4-1 at PageID 98, 104. There is no carveout for regional offices or particular detention facilities. *Id.* All ICE staff must follow the policy. *Id.* Therefore, the Court enjoins application of the Permanent Guidance in the manner described below on a nationwide basis.

V. Conclusion

For the foregoing reasons, the Court: (1) **DENIES** DHS's motion to dismiss, or alternatively for judgment on the pleadings (Doc. No. 29); and (2) **GRANTS** the States' motion for a preliminary injunction (Doc. No. 4). It is hereby **ORDERED** that:

1. Pursuant to Fed. R. Civ. P. 65(a), Defendants United States Department of Homeland Security, Alejandro Mayorkas, in his official capacity as Secretary of the Department of Homeland Security, all their respective officers, agents, servants, employees,

attorneys, and other persons who are in active concert or participation with them are hereby **ENJOINED** and **RESTRAINED** from taking the following actions:

a. Enforcing and implementing Section II of the Permanent Guidance (entitled "Civil Immigration Priorities") (Doc. No. 4-1) to make, determine, or adjudicate noncitizen custody decisions pending removal proceedings contrary to 8 U.S.C. § 1226(c)(1);

b. Enforcing and implementing Section II of the Permanent Guidance (entitled "Civil Immigration Priorities") (Doc. No. 4-1) to authorize the release of, whether on bond, supervision, or otherwise, a noncitizen with a final order of removal during the removal period in violation of 8 U.S.C. § 1231(a)(2); and

c. Enforcing and implementing Section II of the Permanent Guidance (entitled "Civil Immigration Priorities") (Doc. No. 4-1) to delay, continue, or stay the execution of a noncitizen's final order of removal to the extent that no other provision in 8 U.S.C. § 1231, or any other provision of the U.S. Code, justifies the noncitizen's continued presence in the United States beyond the period set forth in 8 U.S.C. § 1231(a).

d. This Order does not limit or restrain DHS from enforcing or implementing the Permanent Guidance in a manner not prohibited herein.

2. This Preliminary Injunction Order applies on a nationwide basis and in every place, territory, or jurisdiction where DHS has authority to enforce the Permanent Guidance.

3. This Order shall be effective pending a resolution of the merits of the States' complaint unless, and until, further order from this Court, the U.S. Court of Appeals for the Sixth Circuit, or the United States Supreme Court states otherwise.

IT IS SO ORDERED. Date:

March 22, 2022

s/Michael J. Newman
Hon. Michael J. Newman
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
DAYTON DIVISION

STATE OF ARIZONA, et al.

Plaintiffs,

v.

JOSEPH R. BIDEN, et al.

Defendants.

Case No. 3:21cv00314
The Honorable Michael J. Newman

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendants hereby appeal to the United States Court of Appeals for the Sixth Circuit this Court's Order of March 22, 2022, entering a preliminary injunction, ECF No. 44, as well as any and all associated opinions and orders.

Dated: March 28, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Branch Director

/s/ Michael F. Knapp
MICHAEL F. KNAPP
CA Bar No. 314104
Trial Attorney
ADAM D. KIRSCHNER
IL Bar. No. 6286601
Senior Trial Counsel
BRIAN C. ROSEN-SHAUD
ME Bar No. 006018
Trial Attorney
KUNTAL CHOLERA
DC Bar No. 1031523

Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-2071
Fax: (202) 616-8460
Email: Michael.F.Knapp@usdoj.gov

EREZ REUVENI
CA Bar No. 264124
Assistant Director
U.S. Department of Justice
Civil Division, Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Email: Erez.R.Reuveni@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on March 28, 2022.

/s/ Michael F. Knapp
MICHAEL F. KNAPP

DECLARATION OF DANIEL BIBLE

I, Daniel Bible, declare the following under 28 U.S.C. § 1746:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Acting Deputy Executive Associate Director. I have held this position since February 14, 2022. As Acting Deputy Executive Associate Director, I oversee the mission of ERO's eight headquarters divisions: Enforcement, Removal, Non-Detained Management, Custody Management, Field Operations, ICE Health Service Corps, Law Enforcement Systems and Analysis, and Operations Support.
2. Prior to this position, I served as the Acting Assistant Director for Field Operations beginning on January 16, 2022. In this capacity, I was responsible for the oversight, direction, and coordination of immigration enforcement activities, programs, and initiatives carried out by ERO's 25 Field Offices including 208 sub-offices and other locations with an ERO presence. I further managed ERO Headquarters components, including Domestic Operations and Special Operations.
3. I have been employed with ICE and the former Immigration and Naturalization Service (INS) since 1998 when I was hired as an Immigration Agent in Huntsville, Texas. From 2001–2006, I served as a Deportation Officer in Oakdale, Louisiana. In 2006, I was promoted to the position of Supervisory Detention and Deportation Officer (SDDO) in San Francisco, California. During my tenure as SDDO, I was responsible for supervisory oversight of two fugitive operations teams, the non-detained section, and the alternatives to detention section. In 2009, I was promoted to the position of Assistant Field Office Director

(AFOD) for the Washington Field Office. During my tenure as AFOD, I had supervisory oversight of SDDOs in charge of the criminal alien program, the 287(g) program, the Field Office's command center, the violent criminal alien section, and two fugitive operations teams. In 2012, I was promoted to the position of Deputy Field Office Director (DFOD) for the New York Field Office. From June 2015 to June 2016, I served as the Field Office Director (FOD) in the Salt Lake City Field Office. From June 2016 to June 2020, I served as FOD in the San Antonio Field Office. From June 2020 until January 16, 2022, I served as FOD for the Houston Field Office. I am a member of the Senior Executive Service, and I report directly to Executive Associate Director Corey Price.

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

II. Overview of ERO

5. Following enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including INS and the U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the enforcement of criminal and civil federal laws governing border control, customs, trade, and immigration. Within ICE, ERO oversees programs and conducts operations to identify and apprehend removable noncitizens, to detain these individuals when necessary, and to remove noncitizens with final orders of removal from the United States. ERO manages and oversees all aspects of the removal process within ICE, including domestic transportation, detention, alternatives to detention programs, bond management, supervised release, and removal to more than 170 countries around the world. As part of the removal process, ERO manages a non-detained docket of more than 4 million cases, which

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

6. ERO employs approximately 6,000 immigration officers nationwide, including executive leadership, the supervisory chain of command, and all field officers. ICE's other law enforcement component, Homeland Security Investigations (HSI), employs approximately 6,000 Special Agents, who are both customs officers and immigration officers. HSI's mission is to investigate, disrupt, and dismantle terrorist, transnational, and other criminal organizations that threaten or seek to exploit the customs and immigration laws of the United States. HSI is responsible for federal *criminal* investigations into the illegal cross-border movement of people, goods, money, technology, and other contraband into, out of, and throughout the United States. HSI Special Agents are thus limited in their ability to engage in civil immigration enforcement.[1]

7. ERO's detention network is similarly limited and has been increasingly populated by individuals apprehended at or near the Southwest Border while seeking to enter the United States. In February of this calendar year alone, U.S. Customs and Border Protection (CBP) apprehended a total of over 164,000 individuals seeking to cross the Southwest Border. *See* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited Mar. 26, 2022). Even with over 91,000 of those individuals expelled pursuant to the U.S. Centers for Disease Control and Prevention's (CDC) Title 42 authorities, over 73,000 were processed under Title 8 of the U.S. Code. Another 75,000 Title 8 cases were

[1] Indeed, the House Report incorporated into the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2022, expresses the intent of Congress to prohibit HSI's "engagement in civil immigration enforcement activities without probable cause that an individual who is the subject of enforcement action has committed a criminal offense not solely related to immigration status." H.R. Rep. No. 117-87, at 5 (2021); *see* Joint Explanatory Statement on Department of Homeland Security Appropriations Act, 2022, available at https://docs.house.gov/billsthisweek/20220307/BILLS-117RCP35-JES-DIVISION-F.pdf.

apprehended in January; 97,000 in December 2021; 84,000 in November 2021; and 70,000 in October 2021. Given these numbers and the Department's important border security mission, ERO's detention population is increasingly occupied by recent border crossers apprehended by CBP and processed pursuant to Title 8 of the U.S. Code. As of March 24, 2022, nearly 86% of the 160,661 noncitizens booked into ICE custody since October 1, 2021 were apprehended by CBP.

8. While some individuals encountered by CBP may be processed entirely within CBP's short-term custody settings, such as some of those who are processed for expulsion under the CDC's Title 42 authorities and some of those processed for expedited removal, most noncitizens processed for immigration proceedings under Title 8 authorities and some processed for expulsion must be transferred to ICE custody. ICE is responsible for and manages DHS's longer-term immigration detention operations, including for those originally apprehended by CBP.

III. Guidance for Immigration Enforcement and Removal Actions

9. On September 30, 2021, Secretary of Homeland Security Alejandro Mayorkas issued Department-wide civil immigration enforcement guidance in a memorandum titled *Guidelines for the Enforcement of Civil Immigration Law* (Mayorkas Memorandum). The guidance took effect November 29, 2021. The Mayorkas Memorandum calls for the prioritization of DHS's limited law enforcement resources on the apprehension and removal of noncitizens who are a threat to national security, public safety, and border security.

10. The Mayorkas Memorandum provides that whether a noncitizen poses a current threat to public safety is not to be determined based on bright-line rules or categories. Instead, application of the public safety priority requires an assessment of the individual and the

totality of the facts and circumstances and, to the extent possible, review of administrative and criminal records and other investigative information. The Mayorkas Memorandum provides that, when evaluating whether a noncitizen poses a current threat to public safety, aggravating or mitigating factors may militate in favor of taking or declining to take enforcements actions.

11. The Mayorkas Memorandum also identifies noncitizens who pose a threat to border security and prioritizes their apprehension and removal. Per the guidance, a noncitizen poses a threat to border security who is apprehended: (1) at the border or port of entry while attempting to unlawfully enter the United States, or (2) in the United States after unlawfully entering after November 1, 2020. The guidance acknowledges that other border security cases may present compelling facts that warrant enforcement action. The guidance further provides that mitigating or extenuating facts and circumstances may militate in favor of declining to take enforcement action in border security cases.

12. Unlike prior civil immigration enforcement prioritization memoranda, including the interim memoranda issued on January 20, 2021, by then-Acting Secretary David Pekoske, and on February 18, 2021, by Acting ICE Director Tae D. Johnson, the Mayorkas Memorandum does not provide guidance pertaining to detention and release determinations. Rather, the Mayorkas Memorandum provides guidance for the apprehension and removal of noncitizens.

13. Additionally, even where prior enforcement guidance memoranda have addressed detention and release, ICE has interpreted and applied such guidance consistent with its longstanding understanding of statutory requirements, case law, and court orders. Specifically, ICE recognizes that except for the specific circumstances described in 8 U.S.C. 1226(c)(2), and where required to comply with court orders, the agency does not have discretion to release

from custody a noncitizen described in 8 U.S.C. 1226(c)(1), if such noncitizen is in DHS custody and removal proceedings are pending against them. Similarly, ICE recognizes that except where required to comply with court orders, the agency does not have discretion during the removal period to release from custody a detained noncitizen who falls within the removability grounds contained in the second sentence of 8 U.S.C. § 1231(a)(2).

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

14. I have read and am familiar with the March 22, 2022, preliminary injunction issued by the U.S. District Court for the Southern District of Ohio in this case.

15. Specifically, the preliminary injunction enjoins and restrains DHS from enforcing and implementing Section II of the Mayorkas Memorandum to:

    a. Make, determine, or adjudicate noncitizen custody decisions pending removal proceedings contrary to 8 U.S.C. § 1226(c)(1);

    b. Authorize the release of, whether on bond, supervision, or otherwise, a noncitizen with a final order of removal during the removal period in violation of 8 U.S.C. § 1231(a)(2); and

    c. Delay, continue, or stay the execution of a noncitizen's final order of removal to the extent that no other provision in 8 U.S.C. § 1231, or any other provision of the U.S. Code, justifies the noncitizen's continued presence in the United States beyond the period set forth in 8 U.S.C. § 1231(a).

16. It is my understanding that DHS interprets the injunction to require the following:

    a. ICE immigration officers may not rely on Section II of the Mayorkas Memorandum to decline to take into custody, upon their release from federal, state, or local criminal custody, any noncitizen: (a) against whom removal proceedings are pending; (b) who ICE has previously determined is subject to mandatory detention pursuant to 8 U.S.C.

§ 1226(c); and (c) with respect to whom they are provided sufficient advance and official notice of such release.

b. ICE immigration officers may not rely on Section II of the Mayorkas Memorandum to release any noncitizen with a final order of removal during the removal period, including during any extension of the removal period for failure to comply with removal efforts.

c. ICE immigration officers may not rely on Section II of the Mayorkas Memorandum to delay or stay execution of any executable final removal order for noncitizens in ICE custody.

17. For the reasons set forth below, implementation of this order is resulting in confusion among the ERO workforce, which has been trained to apply the Mayorkas Memorandum and has been left with no uniform guidance regarding certain enforcement decisions, is operationally burdensome, and is a vast deviation from ICE's prior exercise of discretion.

18. If the order were to be interpreted to mandate particular actions by ICE even more broadly, it would have a devastating impact on ICE operations and the agency's ability to achieve its national security, public safety, and border security mission.

Inability to Prioritize Use of Finite Resources

19. Enforcement actions against the entire population described in the Court's preliminary injunction—that is, all noncitizens being released from federal, state, and local criminal custody pending removal proceedings that ICE has determined to be subject to § 1226(c)(1), and noncitizens in the removal period who are in ICE custody and for whom detention has long been understood not to be mandatory under § 1231(a)(2)—would require ICE bedspace, personnel, and other resources that simply do not exist and would detract from the agency's

ability to meet other pressing operational needs, including those pertaining to supporting the Department's broader public safety and border security mission.

20. ERO is currently appropriated sufficient funding for approximately 31,500 adult detention beds nationwide. However, ICE's access to its full inventory of bedspace is severely limited due to various court orders limiting the intake of noncitizen detainees, an increase in detention facility contract terminations, detention facility contract modifications, and the ongoing COVID-19 pandemic. Specifically, ICE's Pandemic Response Requirements (PRR) for its detention facilities, which are informed by the CDC's COVID-19 guidelines, require that facilities undertake efforts to reduce populations to approximately 75% capacity.[2] Two years ago, the U.S. District Court for the Central District of California issued a nationwide preliminary injunction that remains in effect ordering ICE to maintain additional strict standards to reduce the risk of COVID-19 infection. *See Fraihat v. ICE*, 445 F.Supp.3d 709 (C.D. Cal. Apr. 20, 2020). In light of these mandates, as of March 24, 2022, ICE's currently available bedspace inventory is approximately 25,780 beds; as of March 24, 2022, the currently-detained population of 20,230 noncitizens constitutes more than 78% of the approximately 25,780 currently available adult beds. In reality, the actual number of beds available is even fewer than approximately 25,780, as cohorting and quarantine requirements for facilities often result in unusable beds.

21. Enforcement against all those described in the preliminary injunction beyond those who the Department already recognizes cannot be released from detention pending removal proceedings while in ICE custody would require the arrest and detention of—and thus

[2] ICE's Enforcement and Removal Operations COVID-19 Pandemic Response Requirements (PRR), Version 7.0 (Oct. 19, 2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf (last visited Mar. 23, 2022).

require expenditure of DHS's limited detention space on—those who do not constitute public safety threats, limiting the space available for those who do pose such threats. Notably, not all cases meeting the definition for mandatory custody constitute public safety threats. For example, a lawful permanent resident convicted many years ago of certain drug possession offenses or of filing a false tax return can count as an aggravated felon for purposes of § 1226(c) detention. Conversely, some noncitizens who do pose a current threat to public safety, such as those convicted of certain sex offenses, are not covered by the § 1226(c) detention provision.

22. As a result, by prohibiting ICE immigration officers from implementing the Department's central guidance on the enforcement of civil immigration laws when deciding whether to take certain noncitizens into custody, release other noncitizens from detention, or execute certain removal orders, the court's order and the preliminary injunction would make it difficult for ICE to effectively prioritize the use of its finite resources to carry out its public safety, national security, and border security mission in a fair, consistent, and effective manner. Specifically, the injunction and the order would likely result in the inability of ICE to take into custody and detain some noncitizens ICE has deemed priorities for removal, including recent border crossers, individuals charged but not convicted of serious public safety offenses, and sex offenders like those targeted for enforcement in operations like Operation SOAR (Sex Offender Arrest and Removal), a coordinated effort to arrest and remove noncitizens convicted of egregious offenses against persons that might not subject an individual to § 1226(c) custody.

23. If the order were to be interpreted more broadly to require ICE to arrest, take into custody, and detain *all* known noncitizens described in § 1226(c) or § 1231(a)(2), it would completely

overwhelm ICE's current capacity and more significantly curtail ERO's ability to protect communities from public safety threats or support DHS's broader border security mission. Given the limited detention capacity described above, detaining such individuals would take up beds that might otherwise be used to hold individuals who present a greater danger to the community or flight risk than those described in § 1226(c) or in the second sentence of § 1231(a)(2). For example, a noncitizen with two petty theft offenses could be subject to detention under § 1226(c) or § 1231(a)(2), but a noncitizen with a serious DUI conviction or with pending charges for sex offenses or other violent felonies may not.

24. It is critical that ICE be able to prioritize its finite law enforcement resources on its public safety mission and targeted enforcement operations to locate and arrest national security and public safety threats. To comply with the injunction, ICE may have to redirect resources from these important public safety missions.

Mandatory Detention Under 8 U.S.C. § 1226(c)

25. Historically, DHS has, as an operational matter, generally determined whether the mandatory custody provisions of 8 U.S.C. § 1226(c) apply *after* a noncitizen is arrested and booked into ICE custody. This is the case regardless of whether removal proceedings are already pending at the time of the encounter.

26. In order to facilitate the transfer of custody of a noncitizen from a federal, State, or local law enforcement agency (LEA) to ICE, ICE officers frequently utilize detainers. Detainers alert such LEAs of ICE's interest in taking custody of noncitizens in their custody for whom ICE possesses probable cause of removability. ICE detainers are non-binding requests by ICE for the receiving LEA to both: (1) notify ICE as early as practicable, at least 48 hours, if possible, before a removable noncitizen is released from criminal custody; and (2) maintain

custody of the noncitizen for a period not to exceed 48 hours beyond the time the noncitizen would otherwise have been released to allow ICE to assume custody. All detainers are accompanied by either a warrant of arrest (Form I-200) or a warrant of removal (Form I-205), issued upon a determination by an immigration officer as to probable cause of removability. *See* ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. Detainers do not serve to transfer custody to ICE. Rather, an ICE officer must appear at the LEA's facility and make an arrest.

27. As ICE interprets the Court's injunction to cabin its discretion whether to take into custody pending removal proceedings certain noncitizens upon their release from federal, State, and local criminal custody, it is notable that ERO has identified at least 494 institutions that do not honor detainers, impacting 19 of ERO's field offices. ERO has identified an additional 138 institutions that accept detainers in a limited fashion, such as providing advance notification prior to release but not adequate hold time to allow ERO to assume custody. For instance, in some areas of the country, it may take an ERO officer two hours or more to travel from the local office to the jail facility holding the noncitizen, yet the LEA that owns and operates the facility may only provide 15 minutes' notice prior to release. If the injunction were interpreted as applying beyond those instances in which the agency receives sufficient advance and official notice prior to a release, the agency would, for these reasons, face significant difficulty in complying through no fault of its own.

28. Prohibiting ICE immigration officers from consulting the Secretary's enforcement guidance regarding the prioritization of national security, public safety, and border security threats

when making decisions about whether to take custody over a particular noncitizen being released from federal, state, or local criminal custody also may lead to inconsistent enforcement decisions in field offices around the country. A lack of consistency and predictability can lead to further confusion among the workforce, undermine the agency's ability to project a coherent message to law enforcement partners across the country as well as the public, and subvert efforts to pursue sensible enforcement priorities.

29. If the Court's order were interpreted as requiring a determination of whether a noncitizen in federal, State, or local criminal custody is subject to § 1226(c) mandatory detention—even before the noncitizen is booked into ICE custody—ERO's operations would be severely impacted.

30. The immigration laws generally provide the agency with a period of 48 hours from the time when ICE effectuates an arrest of a noncitizen, including from a federal, State, or local custodial setting, to make a custody determination. *See* 8 C.F.R. § 287.3(d). During the custody determination process, ICE assesses whether the noncitizen should be detained or released, and if released, any conditions of release that should be imposed. It is *subsequent* to taking custody, generally during that custody determination process, that an ICE officer must consider whether an individual in ICE custody is subject to 8 U.S.C. § 1226(c) and its restrictions on release.

31. As an initial matter, DHS is not, and has never been, aware of all non-detained noncitizens who are described in one of the categories of mandatory detention under § 1226(c). Additionally, an officer's determination whether an individual is subject to 8 U.S.C. § 1226(c) can be a complicated inquiry that may entail additional investigation and analysis, including, but not limited to, obtaining additional documents (*e.g.*, the record of conviction,

charging instrument, written plea agreement, transcript of plea colloquy, jury instructions, or any explicit factual finding by the trial judge). Due to the legal complexity of assessing certain grounds of removability based on state convictions, officers also routinely have to consult with agency counsel before a custody decision can be made. In addition, it is my understanding that case law in this area can often change and a state conviction that would render a noncitizen subject to 8 U.S.C. § 1226(c) at the time the detainer was placed may no longer subject a noncitizen to 8 U.S.C. § 1226(c) when ICE is notified of release, or vice versa. I also understand that variations in case law are such that a conviction may give rise to grounds of removability (and potentially trigger 8 U.S.C. § 1226(c)) in one jurisdiction but not in another. Because these complexities require case-by-case review and local coordination, ICE often does not know whether a noncitizen would be covered by 8 U.S.C. § 1226(c) prior to ICE taking custody and conducting the relevant review. In fact, I have been informed that while individuals subject to 8 U.S.C. § 1226(c) are not eligible for release on bond, they are eligible for what to is referred to as a "*Joseph* hearing" in which an immigration judge will determine whether the individual is "properly included" in the scope of 8 U.S.C. § 1226(c). *See* 8 C.F.R. § 1003.19(h)(2)(i)(D). These hearings would likely proliferate exponentially if ICE were required to arrest every noncitizen who may be subject to § 1226(c) detention, with cascading impacts not only on ERO, but also on ICE's Office of the Principal Legal Advisor, who must appear at all of these hearings, and the Department of Justice's Executive Office for Immigration Review, which must provide an immigration judge to consider the evidence and render a decision. An increased workload in this area would likely slow down other immigrations proceedings, hindering DHS efforts to secure final orders of removal.

32. Moreover, the applicable charge(s) of removability in a given case may not readily identify the noncitizen as being subject to mandatory custody. For example, if a noncitizen who is in removal proceedings as a non-criminal visa overstay is arrested and convicted for a removable offense listed in 8 U.S.C. § 1226(c)(1)(A)–(D), that ground does not need to be formally charged as the basis of removal in order to trigger mandatory detention. *See Matter of Kotliar*, 24 I&N Dec. 124, 126–27 (BIA 2007). And, because a criminal charge alone (as opposed to a conviction) will not generally trigger 8 U.S.C. § 1226(c), noncitizens with pending criminal charges may shift from being subject to 8 U.S.C. § 1226(a) to § 1226(c) upon being convicted. Accordingly, even information in ICE databases regarding charges of removability lodged in a given case would not necessarily even indicate whether § 1226(c) applies.

33. Moreover, were a court to mandate the arrest of all noncitizens who have removal proceedings pending and who could possibly be subject to restrictions on release from custody upon arrest, it would be extraordinarily burdensome—and likely impossible—for ERO to achieve compliance. As of March 20, 2022, there were nearly 325,000 noncitizens in pending removal proceedings on ERO's non-detained docket with either criminal convictions or pending criminal charges.

34. Further, ERO may not be aware of a noncitizen's criminality at the time a Notice to Appear (NTA) is issued by another component, making any requirement that ERO arrest any noncitizen potentially subject to § 1226(c) impossible. For example, U.S. Citizenship and Immigration Services (USCIS) may issue an NTA to a removable noncitizen after adjudicating and denying an application over which it has jurisdiction, such as an asylum application or an application for adjustment of status. ERO is not generally notified when

USCIS issues an NTA, and an NTA issued by USCIS may not charge criminal grounds of removability in all cases in which they are applicable.

35. If a court were to additionally require a §1226(c) determination for all noncitizens who are in removal proceedings—including noncitizens who are not currently detained by ICE—it would impose insurmountable burdens on ERO, which would have to shift considerable resources to make those complicated determinations and then conduct at-large arrest operations.

36. At-large arrests of removable noncitizens are resource intensive and, like any law enforcement operation, can pose a danger to ICE officers, the noncitizen at issue, and members of the public. At-large arrests of removable noncitizens generally require at least two officers to be present for officer safety reasons, and arrests at a residence usually require five or more officers. During an at-large arrest, the target may be armed; the officers have no physical control over the location; and there is always the potential for disruption of the enforcement action by the target's family members, associates of the target, or members of the community. Moreover, a team of ICE officers must engage in time-consuming work (e.g., database searches, visits to addresses(es) associated with the target, deconfliction with the activities of other law enforcement agencies, and surveillance), in order to locate each at-large noncitizen.

Release Under § 1231(a)

37. As of March 20, 2022, there were 3,889 noncitizens with final orders of removal in ICE custody. Nearly 1.2 million noncitizens with final orders of removal remain at large. Many of these individuals likely were never detained during removal proceedings or were released

from custody at some point in accordance with the discretionary authority vested in ICE immigration officers by statute or pursuant to orders by immigration judges or federal courts.

38. DHS has historically understood § 1231(a)(2) as authorizing the detention of noncitizens during the removal period, but prohibiting the release during the removal period only of those detained noncitizens found inadmissible under § 1182(a)(2) or (a)(3)(B) or deportable under § 1227(a)(2) or (a)(4)(B). Accordingly, ICE has exercised its discretionary authority to release some detained noncitizens during the removal period who have not been found inadmissible or deportable based on the specific grounds referenced in § 1231(a)(2).

39. If the nationwide injunction were interpreted to require that ICE maintain custody of every detained noncitizen during the removal period and not simply those that the statute says the agency shall release "under no circumstance," contrary to DHS's historical understanding of the statute and its current interpretation of the injunction, ICE would not have sufficient detention resources to implement the order while carrying out its broader mission priorities effectively. As discussed above, ICE is appropriated for limited bed space and lacks capacity to continue to detain each detained noncitizen during the removal period. ICE must balance competing detention priorities, including individuals apprehended while attempting to enter the United States and individuals subject to § 1226(c) custody or who otherwise pose national security or public safety risks, when allocating detention space.

40. Additionally, implementation of such an order would significantly alter ICE operations in support of its mission. Detention during the removal period is intended to facilitate removal. Factors beyond ICE's control may limit—or frustrate entirely—its ability to remove a noncitizen during the removal period. For example, many receiving countries have lingering COVID-related border closures and pre-removal testing and/or vaccination requirements that

can complicate removal operations. This is further exacerbated in receiving countries that were already reluctant or non-cooperative prior to the pandemic. Several countries do not issue travel documents for their citizens, or only do so on a very limited basis. Limited direct and transit flight routes pose further complications. Natural disasters and armed conflict can further prevent removal during the removal period. The situation in Ukraine, for example, has significantly complicated potential removals. Absent special circumstances justifying continued detention, ICE generally releases a noncitizen who is subject to a final order of removal after expiration of the removal period when there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future. When it is clear even during the removal period that this is the case, ICE often releases such noncitizens so long as it not constrained by the "under no circumstance" limitation in the statute. If the nationwide injunction were interpreted to require ICE to maintain custody of all noncitizens throughout the removal period, without regard to the distinct treatment that the statute provides in the second, "under no circumstance," sentence, it would require ICE to detain individuals whom it anticipates will be released after expiration of the removal period because there is no significant likelihood of removal in the reasonably foreseeable future, needlessly wasting limited detention resources.

41. Moreover, if the order were interpreted to require the continued detention of all noncitizens during the removal period, the injunction would likely affect bilateral relations with other countries. For example, ICE announced this month that it had paused repatriation flights to Ukraine in light of the ongoing humanitarian crisis there. And, early in the COVID-19 pandemic, restrictions on international travel affected removal operations to certain countries.

It would be futile, and potentially impact cooperation from other countries, if ICE were to indiscriminately detain individuals where removal is unlikely.

42. If interpreted to mandate that ICE maintain custody of every detained noncitizen during the removal period, the injunction would also bar the release of noncitizens who have been granted withholding of removal under § 1231(b)(3). While a grant of withholding of removal only limits repatriation to certain countries, removal to third countries is rare. I am not personally aware of instances in which ICE executed a removal order to a third country where the noncitizen had been granted withholding of removal. Noncitizens granted withholding of removal are subject to § 1231 detention. *See* 8 C.F.R. § 241.4(b)(3). So a broadly construed order would require, for no operational reason, the 90-day detention of noncitizens who have established a clear probability of persecution in the country of removal.

Removals

43. The preliminary injunction directing that DHS not rely on the Mayorkas Memorandum to "delay, continue, or stay the execution of a noncitizen's final order of removal" absent statutory justification has already presented operational challenges. I am told that, in the short time since the order issued, immigration officers have expressed considerable doubt and uncertainty about the scope of the mandate.

44. Section 1231(c)(2) provides that the Secretary may stay the removal of a noncitizen if immediate removal is not "practicable or proper." The Secretary has delegated that authority to certain ICE officials. DHS has long considered its stay authority discretionary and exercised its authority to stay noncitizen's removal following case-by-case evaluation, consistent with the statutory standard, since before the Mayorkas Memorandum took effect.

45. The Court's order and preliminary injunction inject considerable confusion into the stay adjudication process because many of the factors militating in favor of declining to enforce a removal order under the Mayorkas Memorandum were also considered as part of DHS's discretionary decision-making before the memorandum took effect. ICE can issue a stay either on its own initiative or upon receipt of an application. Applicants for an administrative stay under § 1231(c)(2) file Form I-246, Application for a Stay of Deportation or Removal, with the ERO field office with jurisdiction over the noncitizen at the time of filing. ICE most recently amended Form I-246 in 2020. The form provides space for the requesting noncitizen to state reasons for the stay request and describe evidence, including medical documentation, submitted in support of the request. ICE officials have broad discretion in weighing the information and evidence provided in a stay application.

46. If the prohibition on implementing Section II of the Mayorkas Memorandum to delay, continue, or stay execution of a removal order were interpreted to extend to noncitizens not in ICE custody, confusion about implementation of the order would be amplified with respect to noncitizens with final orders of removal who are on orders of supervision or who have never been detained. Section 1231(a)(3) provides for release on supervision in cases where the noncitizen "does not leave or is not removed within the removal period." Generally, in order to comply with legal requirements imposed by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), noncitizens with final orders of removal who are released on orders of supervision are not re-detained until and unless removal becomes likely in the reasonably foreseeable future.

47. The operational burden on ICE would be immense if § 1.c of the order were interpreted to mean that ICE must, without delay, effectuate removal of every noncitizen—including those

who are not detained—who has a final order of removal and for whom ICE has not adjudicated a stay request pursuant to § 1231(c)(2), given the Court's reference to other provisions in § 1231 that may justify a noncitizen's continued presence in the United States. A manual review by ERO field offices found that ERO adjudicated approximately 1,775 stay requests between October 1, 2020, and September 30, 2021. Adjudication of a stay request requires resources to review the documents submitted, issue fee stamps, and draft case summaries and written responses. Processing stay requests from among the population of approximately 1.2 million noncitizens with final orders of removal would be unreasonably burdensome, if not impossible. This burden would be particularly heightened in light of the fact that the fee for Form I-246 has not been updated since 1996, and ICE has determined "the current fee for Form I-246 does not fully recover the costs incurred to perform the full range of activities associated with determining if a foreign national ordered deported or removed from the United States is eligible to obtain a stay of deportation or removal." Fee Adjustment for U.S. Immigration and Customs Enforcement Form I-246, Application for a Stay of Deportation or Removal, 87 Fed. Reg. 5090, RIN 1653-AA82 (Jan. 31, 2022) (proposing to complete a fee study to determine an appropriate adjustment to the fee that would capture the full cost of accepting or denying an alien's request for a stay).

48. In addition, if § 1.c of the Court's order were to be interpreted overly-broadly, it would affect ERO's longstanding discretionary authority to defer removal action. For decades, ERO has deferred the removal of certain final order noncitizens, as contemplated by regulation. *See* 8 C.F.R. § 274a.12(c)(14); *Reno v. Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 484 (1999) (recognizing this practice); Detention and Removal Operations Policy and Procedure Manual (DROPPM) Ch. 20.8, 2014 WL 7151957 (formalizing the deferral practice). Rather

than a formal stay of removal, "deferred action" is simply a matter of administrative convenience to ICE in deprioritizing some cases for removal over others. Among other cases, ICE regularly grants deferred action to noncitizens cooperating with other law enforcement agencies. If § 1.c of the injunction were read to limit or restrict those decisions, ICE would need to either remove such individuals, thereby undercutting criminal justice goals, or develop and execute a plan to reprocess such cases, which would consume significant resources and could adversely impact important criminal investigations and prosecutions. Also, individuals with deferred action are explicitly authorized to request employment authorization, 8 C.F.R. § 274a.12(c)(14), and the possibility of invalidating deferred action grants to noncitizens with final orders could create confusion and uncertainty for them and their employers.

V. Operational Flexibility and Consistency

49. The implementation of the enforcement priorities has assisted ERO in re-deploying assets to meet the current threat and reality. Through effective prioritization of resources, ERO is better able to adjust in real time to pressing operational needs. For example, ERO re-tasked several field operations teams to assist CBP in responding to state and local requests for assistance in the Rio Grande Valley, Del Rio, and Tucson areas to address increasing activity along the Southwest Border. Additionally, in recent months, ERO has continuously deployed approximately 300 officers to the Southwest Border to support CBP operations, for a total of 1,879 ERO personnel deployed between June 1, 2021, and March 14, 2022. These deployments are expected to continue for the foreseeable future, and may even increase depending on operational demands at the border. Officers and staff deployed from their normal duty stations to assist with border operations are generally unavailable to make

arrests, manage detention, or effectuate removals in the interior. The support ERO provides at the Southwest Border includes, but is not limited to: transporting; processing; enrollment in alternatives to detention; removals; bedspace management of those taken into custody, including those subject to expedited removal proceedings pursuant to 8 U.S.C. § 1225(b)(1); and transfers of those taken into custody. This flexibility has enabled ERO to address border security, consistent with the Mayorkas Memorandum, by focusing its resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States. Implementing the terms of the Court's preliminary injunction would likely force ERO to realign field teams and other assets to allocate limited time and resources on non-criminal and other lower priority targets. Such a reallocation would likely disrupt ERO's ability to have a meaningful impact on important border security efforts. A shift in resources to detain those subject to §§ 1226(c)(1) or 1231(a)(2) also limit resources available to detain recent border-crossers, who, for lack of detention resources, will likely be released.

50. An injunction that prohibits ICE immigration officers from consulting the prioritization guidance in Section II of the Mayorkas Memorandum when making discretionary enforcement decisions—or that restricts their discretionary authority entirely in certain respects—will lead to disparate prioritization across the country and a lack of consistency in enforcement actions. This could result in an undesirable shift in enforcement away from those who present the greatest risk to public safety and undermine public confidence in the nation's immigration enforcement efforts. Further, an attempt to take enforcement actions indiscriminately among this population, instead of against certain prioritized noncitizens, would not be an efficient or reasonable use of ICE's limited resources and would likely

prevent ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety.

Signed on this 28th day of March, 2022.

DANIEL A BIBLE

Digitally signed by DANIEL A BIBLE
Date: 2022.03.28 20:39:37 -05'00'

Daniel Bible
Acting Deputy Executive Associate Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement