No. 22-3272

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

BRIEF OF THE STATES OF ARIZONA, MONTANA, AND OHIO

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

The States request oral argument, which is already scheduled, because it may aid the Court in its resolution of the questions presented.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1331. It entered a preliminary injunction on March 22, 20222. The appellants appealed on March 28. This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

STATEMENT OF THE ISSUE

A federal statute says that DHS "shall" arrest and detain certain criminal aliens upon their release from criminal custody. 8 U.S.C. §1226(c). Another says DHS "shall" detain and remove aliens with final orders of removal. 8 U.S.C. §1231(a). DHS adopted a policy that forbids officers from carrying out these mandatory duties except where a set of extra-statutory factors are satisfied. Did the District Court properly enjoin the policy?

INTRODUCTION

DHS bemoans the "recent explosion of suits brought by States" challenging immigration policies under the Administrative Procedure Act. DHS Br.18. It never pauses to ask what caused this explosion. That is likely because the answer is both clear and uncomfortable: the executive and judicial branches failed to uphold their ends of the constitutional bargain, leaving the States with no other option.

Start with the executive branch. The President must "take Care that the Laws be faithfully executed." U.S. Const. art. II, §3. But recent administrations have taken great care to *undermine* the faithful execution of immigration laws. Through the rote invocation of "prosecutorial discretion," a series of Presidents have neutered immigration enforcement. At times, Presidents have adopted policies effecting "a categorical suspension of existing law." *Arpaio v. Obama*, 797 F.3d 11, 30 (D.C. Cir. 2015) (Brown, J., concurring); *see also Texas v. United States* (*DAPA*), 809 F.3d 134, 146–47 (5th Cir. 2015), *aff'd by* 579 U.S. 547 (2016). On other occasions, Presidents have dropped successful policies without putting any viable alternative in place. *See, e.g.*, *Texas v. Biden* (*MPP*), 20 F.4th 928, 941 (5th Cir. 2021).

This case presents more of the same. It concerns DHS's "Anti-enforcement Policy"—a more apt name for what this Court and the parties have called the "Guidance." 31 F.4th 469, 473 (6th Cir. 2022). The Policy governs the arrest and removal

of illegal aliens. This Policy purports to implement the immigration laws. But it stands at odds with two such laws. One says DHS "shall" arrest certain criminal aliens upon their release from criminal custody and detain them until they are removed. 8 U.S.C. §1226(c). Another says DHS "shall" remove aliens with final orders of removal within 90 days. §1231(a)(1)(A). Both impose mandatory duties. *See Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021). Nonetheless, the Anti-enforcement Policy *forbids* officials from enforcing these laws except in cases where extra-statutory guidance within the Policy permits enforcement.

DHS claims it adopted the Policy to improve community safety. It claimed the Policy would allow it to focus its scare resources on pressing law-enforcement needs, including at the southwest border. "A suspicious mind (or even one that is merely not naïve)," could not possibly credit this. *Ohio v. Clark*, 576 U.S. 237, 253 (2015) (Scalia, J., concurring in the judgment). The ordinary citizen knows this Administration, like others before it, is working to *undermine* immigration enforcement. No fair-minded observer could view the situation on the border and conclude that security has improved over the past year. *See* John Gramlich and Alissa Scheller, *What's happening at the U.S.-Mexico border in 7 charts*, Pew Research Center (Nov. 9, 2021), https://perma.cc/Z9WB-WF3C; Janet Shamlian, *Fentanyl seizures skyrocket along*

U.S.-Mexico border, CBS News (June 9, 2021), https://perma.cc/XPP3-RP5R. Moreover, DHS arrested 34,300 fewer criminal aliens in fiscal year 2021 than in fiscal year 2020 and 55,800 fewer criminal aliens than in 2019. *Compare* ICE Annual Report Fiscal Year 2021 at 8 (Mar. 11, 2022), https://perma.cc/EFK5-4LCV *with* Fiscal Year 2020 Enforcement and Removal Operations Report at 4, 14 ("2020 ERO Report"), https://perma.cc/WG7U-TUEQ; Fiscal Year 2019 Enforcement and Removal Operations Report at 12–13 ("2019 ERO Report"), https://perma.cc/E3MS-DLEP. Removals of dangerous criminal aliens in every category—killers, sex offenders, and so on—are down. Crediting DHS's claim to good-faith enforcement requires "exhibit[ing] a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) ("*Census*") (quotation omitted).

The judiciary shoulders some blame, too. In large part because of the executive branch's flimsy enforcement, citizens in the States "feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy." *Arizona v. United States*, 567 U.S. 387, 437 (2012) (Scalia, J., concurring in part and dissenting in part). But the States are largely powerless to respond by enacting their own protective laws, because the Supreme Court misconstrued federal law to bar States from adopting policies aimed at countering illegal immigration. *Id.* at 416 (majority op.). This "deprive[d] States

of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there." *Id.* at 417 (Scalia, J., concurring in part and dissenting in part).

Advocating for legislative change will do no good, *contra* DHS Br.18–19, because the executive branch refuses to follow the laws Congress passes. So the States have reached for the only arrow remaining in their quivers: the Administrative Procedure Act, or "APA." *See DAPA*, 809 F.3d 134.

That is how we got here. Where are we going? Both DHS's brief and this Court's stay-stage opinion express a desire to either end or severely curtail the only path the States may take to protect themselves and their citizens. Ending such suits would be wrong as a matter of law. And it would be dangerous as a matter of policy. Nothing good will come from a system in which the States are without legal recourse for protecting themselves from a President's refusal to follow the law.

STATEMENT

1. Federal law charges DHS with enforcing immigration laws. 8 U.S.C. §1225 *et seq.*; Homeland Security Act, 6 U.S.C. §112; 8 U.S.C. §1103. Generally speaking, it leaves DHS with immense discretion to direct the enforcement (or nonenforcement) of those laws. But there are notable and intentional exceptions. One decades-old exception pertains to criminal aliens. In 1988, Congress amended the

Immigration and Nationality Act to mandate the arrest and detention of aliens convicted of narrowly defined aggravated felonies. *See* Pub. L. 100-690, §7343, 102 Stat. 4181, 4470 (1988). Congress's amendments added mandatory language to a statute that *allowed* arrest and detention. 8 U.S.C. §1252(a)(1) (1982). The new language required certain arrests: "The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction." §1252(a)(2)(A) (1988); *see* 102 Stat. at 4470.

DHS's predecessor agency (the "INS") took the hint. It told its officers that, "in the case of a deportable alien who is convicted of an aggravated felony and who has not been lawfully admitted and is thereby subject to mandatory detention under Section 242(a)(2)(A) of the Act, the AG, and thus the INS, is statutorily precluded from exercising discretion either to release the alien upon his or her release from incarceration or to refrain from instituting deportation proceedings." Genco Op. No. 93-80, 1993 WL 1504027, at *3. In other words, INS understood the mandatory language to impose a mandate.

2. This mandate proved unsatisfactory. INS exhibited a "wholesale failure … to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003). So in 1996, "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for

their removal hearings in large numbers," decided to "require that" some aliens "be detained for the brief period necessary for their removal proceedings." *Id.* at 513. It did so by enacting §1226(c), which provides that immigration officers "shall take into custody" a broader group of criminal aliens—not just aggravated felons—after their release from criminal detention. §1226(c)(1). The same statute forbids releasing these aliens before their removal, except in very narrow circumstances. §1226(c)(2).

The new §1226(c) threatened to overwhelm the agency's bed-space capacity. So "Congress, at the request of the INS, enacted a two-year grace period for application of the criminal detention provisions in" §1226(c). *Galvez v. Lewis*, 56 F. Supp. 2d 637, 641 (E.D. Va. 1999). If, during the two-year grace period, INS told Congress it had insufficient bed space to carry out mandatory detainers, the agency would be relieved of the mandatory duties. Pub. L. 104-108, §303, 110 Stat. 3009–586 (1996). At the end of the two-year period, INS asked for another extension. Congress refused, at which point the arrest mandate took effect. *INS Issues Detention Guidelines After Expiration of TPCR*, 75 No. 42 Interpreter Releases 1508, 1508 (Westlaw November 2, 1998).

Congress included in its 1996 reforms one other statute relevant to this case: §1231(a)(1)(A). It says that authorities "shall remove" an alien within 90 days after a final order of removal. It thus "mandates that 'when an alien is ordered removed,

the Attorney General shall remove the alien from the United States within" the 90-day removal period. *Martinez v. Larose*, 968 F.3d 555, 561 (6th Cir. 2020). This statute, too, reflects Congress's dissatisfaction with immigration officials' meager enforcement efforts. "There ha[d] been little progress in apprehending the tens of thousands of illegal aliens who abscond each year from deportation orders." *Removal of Criminal and Illegal Aliens, Hearing Before the House Subcommittee on Immigration and Claims*, 104th Cong. Rec. 2 (Sept. 5, 1996) (statement of Lamar Smith, chairman, Subcommittee on Immigration and Claims); *see also* S. Rep. No. 104-48, at 24 (1995). Section 1231 was supposed to fix that. One House Report described it as the most "important" aspect of Congress's reforms. H.R. Rep. No. 104-469, at 161 (1996).

3. DHS has repeatedly recognized that these statutes impose mandatory duties. With respect to §1226(c) in particular, DHS has consistently maintained that the law "eliminate[s] all discretion" and imposes a "duty to arrest … criminal alien[s]." Pet. Br., *Nielsen v. Preap*, 2018 WL 2554770, at *17, *23 (U.S. Jun. 1, 2018) (quotation omitted); *see also* Oral Arg. Trans., *Nielsen v. Preap*, 2018 WL 4922082, at *6–*7 (U.S. Oct. 10, 2018). Of course, DHS, like every other human enterprise, faces resource constraints. For that reason, it has long helped its officers prioritize

enforcement efforts. But before the Policy at issue here, each of those prioritization schemes shared two features.

First, each prioritization scheme implemented Congress's mandates by prioritizing criminal aliens and aliens with final orders of removal. A 1998 memorandum issued after the expiration of the two-year grace period, for example, prioritized the removal of aliens subject to §1226(c) and §1231(a), which it called "Category 1" aliens. *INS Issues Detention Guidelines*, 75 No. 42 Interpreter Releases at 1510–11. The same memorandum provided detailed instructions designed to ensure that a lack of bed space in any one region did not lead to a priority alien's release. *Id.* Later memoranda followed suit. One, from 2011, prioritized the detention and removal of: (1) criminal aliens, including those with outstanding warrants or who otherwise pose a risk to public safety; (2) recent border crossers; and (3) aliens with final orders of removal who fail to show up to their deportation flight. Morton Mem., R.27-5, PageID#485–87. Another, from 2014, prioritized: (1) aliens convicted of felonies, repeat offenses, or significant misdemeanors; (2) recent border crossers; and (3) aliens with recent final orders of removal. Johnson Mem., R.27-7, PageID#497–98. And the "Kelly Memorandum," issued in 2017, prioritizes categories mentioned by Congress along with other public-safety threats. Kelly Mem., R.27-8, PageID#502. Of particular relevance, this memorandum explained that DHS could not "exempt

classes or categories of removable aliens from potential enforcement" and required DHS personnel to "take enforcement actions in accordance with applicable law." *Id.*, PageID#502.

Each of these memoranda also shared a second important feature: they allowed officers to take enforcement actions against non-priority aliens. The Morton Memorandum said that officers could "pursue the removal of any alien unlawfully in the United States, although attention to these aliens should not displace or disrupt the resources needed to remove aliens who are a higher priority." R.27-5, PageID#487. Similarly the Johnson Memorandum declined to "discourage" enforcement against any alien "unlawfully in the United States"—it simply asked that resources be "dedicated, to the greatest degree possible," to priority aliens. R.27-7, PageID#499. The Kelly Memorandum was more direct: "Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens." R.27-8, PageID#502.

These policies enabled DHS to prioritize public-safety threats. During the years in which the Kelly Memorandum was in effect, between 85–90 percent of all ICE arrests involved convicted criminals or those with pending criminal charges. *See* Fiscal Year 2017 Enforcement and Removal Operations Report at 4, https://perma

.cc/8XH4-R2VF; Fiscal Year 2018 Enforcement and Removal Operations Report at 2, https://perma.cc/2UYY-P8YA; 2019 ERO Report at 12; 2020 ERO Report at 4.

4. In January 2021, the Acting Secretary of Homeland Security replaced the Kelly Memorandum with a new one barring removals while DHS searched for policies more aligned with its "values." R.27-9, PageID#508–09. A federal court temporarily enjoined the moratorium, *Texas v. United States*, 515 F. Supp. 3d 627, 639 (S.D. Tex. 2021), but DHS never appealed. Instead, about a month later, the Acting ICE Director issued superseding guidance. The "February 18 Memorandum" announced three "priority" categories: threats to national security, border security, and public safety. R.27-10, PageID#515. Aliens convicted of an aggravated felony and gang members constituted public-safety threats. *Id.* But the Memorandum prohibited field officers from removing any alien outside a priority category without preapproval from a supervisor. *Id.*, PageID#517. In practice, this ended enforcement against non-priority immigrants. Decl. of Thomas Homan, R.4-18, ¶35.

On September 30, 2021, DHS replaced the interim policy with an even narrower final policy, the Anti-enforcement Policy at issue here. R.4-1. The Policy, like past policies, prioritizes enforcement against some aliens. But it is distinct from past policies in that it *prohibits* officers from enforcing the law against non-priority aliens. "The fact an individual is a removable noncitizen" should not "be the basis of an

enforcement action" unless the Policy permits enforcement. R.4-1, PageID#99. To be sure, the Policy claims not to "compel an action to be taken or not taken." *Id.*, PageID#102. But that is inconsistent with the Policy's text and on-the-ground realities.

Start with the text. The Policy recognizes three categories of aliens subject to enforcement actions: national-security threats; public-safety threats; and border-security threats. *Id.*, PageID#100–01. National-security threats are always eligible for removal. The eligibility of aliens in other categories turns on a non-statutory test. The Policy lays out a non-exhaustive list of aggravating and mitigating factors relating to whether an alien is a public-safety threat. And it "requires an assessment of the individual and the totality of the facts and circumstances," while forbidding the use of "bright lines or categories." *Id.*, PageID#100. Agency "personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." *Id.*, PageID#101. Immigration officials are *prohibited from* taking an enforcement action against an alien simply because he is subject to mandatory arrest under §1226(c). That is what the Policy means when it says agents "should not rely on the fact of conviction … alone" in making enforcement decisions. *Id.* And that is what Secretary Mayorkas was talking about when he boasted that the Policy, for the "first time" in history, would eschew a "categorical approach to

enforcement" in favor of an approach "requir[ing]" enforcement actions to rest upon "an assessment of the individual and the totality of the facts and circumstances." *Secretary Mayorkas Announces New Immigration Enforcement Priorities* (Sept. 30, 2021), https://perma.cc/Q429-4X8S.

Note that aliens with orders of removal under §1231(a)(1)(A) are not a priority category. Neither are criminal aliens subject to mandatory arrest under §1226(c). Thus, agents cannot arrest, detain, and remove these aliens unless they fall within a priority category. And if an agent determines that the *only* factor supporting enforcement is the fact that the alien is made arrestable or removable by statute, he may not take enforcement action. Put differently, the Policy starts from a presumption that the agency will not enforce immigration laws against individuals whose detention and removal Congress made mandatory. It says: "Our personnel should not rely on the fact of conviction or the result of a database search alone." R.4-1, PageID#101.

On-the-ground practice removes any doubt that the Policy forbids enforcement supported only by eligibility under §1226(c) or §1231(a)(1)(A). ICE officers must show that their decisions comport with the Policy before submitting detainer requests for criminal aliens about to be released from criminal custody. *See* Plaintiffs' Post-Trial Br., *Texas v. United States*, No.6:21-cv-16, Doc. 224, at 3 (S.D. Texas) (Mar. 19, 2022). Emails show that the Policy—not overcrowding, lack of interest, or lack

of time—has caused immigration officers to lift detainers. R.39-1, PageID#1002–03. On top of all this, ICE allows aliens to challenge removals that do not "meet DHS's priorities for enforcement." U.S. Immigration and Customs Enforcement, *Contact ICE About an Immigration/Detention Case* (updated Mar. 9, 2022), https://perma.cc/RP5T-NNA3.

5. The Policy succeeded in thwarting immigration enforcement. Consider first the data on interior arrests. In 2019, before the Policy's adoption, ICE arrests (as measured by "book-ins") averaged about 11,200 aliens per month. FY19 Detention Statistics, https://perma.cc/KJK8-CU4V (view Detention FY19 tab, row 21, columns M–U); FY20 Detention Statistics, https://perma.cc/636D-CXMS (view Detention EOFY2020 tab, row 22, columns J–L). In 2020, because of the pandemic, that number dropped to 7,300 per month. FY20 Detention Statistics (view Detention EOFY2020 tab, row 22, columns M–U); FY21 Detention Statistics, https://perma.cc/3M3X-DZ7D (view Detention FY21 YTD, row 22, columns J–L). But in 2021, the number dropped even further to 3,250 per month. FY21 Detention Statistics (view Detention FY21 YTD, row 22, columns M–U); FY22 Detention Statistics, https://perma.cc/2CZD-D75Y (view Detention FY22 tab, row 22, columns J–L). What caused this drop? Acting Phoenix ICE Director Albert Carter said that only the interim "prioritization" policies, on which the Policy is based, could have had

this effect. R.4-11, PageID#200. (DHS now suggests that the decreased numbers are the result of its sending 300 officers to the border. *See* DHS Br.23; Bible Decl., R.49-1, PageID#1198–99. But DHS sent the same number to the border in 2019, *see* 2019 ERO Report at 12, and nonetheless performed 95,164 more interior arrests and 104,027 more border arrests. *See* CBP book-in data in FY19–22 spreadsheets.)

With respect to arrests, the Policy has not resulted in very much prioritization of prioritized aliens. As of May 4, 2022, 93.5 percent of individuals detained in the interior (as opposed to the border) were convicted criminals or had pending criminal charges. FY22 Detention Statistics (view Detention FY22 tab, rows 20 through 22, column B). That is comparable to the composition under past policies. *See, e.g.*, FY 2019 Detention Statistics (view Detention FY19 tab, rows 20 through 22, column B). Thus, the Policy has not altered the makeup of detained aliens—it has simply reduced the total number of aliens detained in the first place.

Interior removals dropped, too. DHS has yet to publish complete data on this issue. But limited releases of agency-wide data show that ICE executed only 31,364 removals between October 2021 and May 4, 2022. FY2022 Detention Statistics (view Detention FY22 tab, row 29, columns P–R). That means ICE is on pace to remove only 53,246 aliens in this fiscal year—214,012 fewer removals than in fiscal year 2019, and 132,638 fewer removals than fiscal year 2020. *See* FY19 Detention

Statistics (view Detention FY19 tab, row 29, columns P–R); FY20 Detention Statistics (view Detention EOFY2020, row 29, columns P–R).

Removals of serious criminal aliens have dropped as well. Between January and July of 2019, ICE removed 17,553 such aliens. During 2020—the height of the pandemic, when resources were strained and immigration lessened—ICE removed 13,120 such aliens. But as of late 2021, it had removed only 6,000 such aliens. Jessica M. Vaughan, *Deportations Plummet Under Biden Enforcement Policies*, Center for Immigration Studies (Dec. 6, 2021), https://perma.cc/U8YJ-BT76. No matter the category of crime—homicide, aggravated assault, burglary, kidnapping, robbery, or sexual assault—removals of dangerous aliens are down. *Id.*

6. To protect themselves and their citizens, the States brought this APA action against the Policy. The District Court granted a preliminary injunction, concluding that the Policy was illegal on three separate grounds. Op., R.44, PageID#1119–38. DHS then appealed to this Court, which stayed the injunction and ordered expedited briefing.

SUMMARY OF ARGUMENT

This case turns on the meaning of two federal laws and one federal policy. Start with the laws. The first, 8 U.S.C. §1226(c), says that DHS "shall" arrest aliens convicted of certain crimes immediately upon the aliens' release from criminal

custody. §1226(c)(1). Except in narrow circumstances not relevant here, DHS must detain these aliens until they are removed. §1226(c)(2). The second, 8 U.S.C. §1231(a)(1)(A), says DHS "shall" remove aliens who are "ordered removed … within a period of 90 days." Both laws, as a matter of plain text and Supreme Court precedent, impose mandatory duties. *Nielsen*, 139 S. Ct. at 969; *accord Johnson*, 141 S. Ct. at 2281.

Now consider the policy. DHS's Anti-enforcement Policy lays out a prioritization scheme to guide immigration officers' enforcement decisions. But the Policy goes beyond simply announcing priorities. It prohibits officers from taking enforcement action against non-prioritized aliens. Officers cannot, for example, arrest or remove aliens based exclusively on their statutory eligibility for arrest or removal. And it does not prioritize aliens covered by §1226(c) or §1231(a)(1)(A). Thus, officers may arrest or remove these aliens *only if* the Policy permits them to. It thus prohibits officers from taking enforcement actions that Congress made mandatory. *See above* 12–15.

The District Court preliminarily enjoined the Policy. Four factors govern the preliminary-injunction analysis: "(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." *Wilson v. Gordon*, 822 F.3d 934, 952 (6th Cir. 2016) (quotation omitted). Because the States have satisfied all four factors, this Court should affirm.

I.A. The case is properly before the Court. The States have standing to sue for redress from two types of injuries the Policy inflicts on them. The first injury is economic. Logic suggests, and the record confirms, that the Policy has caused and will continue causing more criminal aliens and aliens ordered removed to remain within the States. The States will bear the costs of supervising criminal aliens who are released; of increased strain on their social services; and, given that criminal aliens are prone to recidivate, they will sustain costs in the form of additional crime. These costs can be traced to the Policy and redressed with an injunction. The same goes for the States' second injury: the sovereign injury they sustain as a result of the non-exclusion from their "sovereign[] territory" of aliens "who have no right to be there." *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part). That injury is especially grave because the States must depend on the federal government to protect that interest. When a State sustains a sovereign injury because of the federal government's refusal to act in an area where federal power is exclusive, the State has standing to sue. *Massachusetts v. EPA*, 549 U.S. 497, 518–22 (2007).

The remaining reviewability requirements are also satisfied. *First*, the Policy is a "final agency action" subject to APA review. 5 U.S.C. §704. A "final" action determines "rights or obligations" or has "legal consequences." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 597 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The Policy qualifies. It binds officers by prohibiting them from detaining or removing an alien whose detention or removal is inconsistent with the Policy. And it confers rights on immigrants, who can dispute enforcement actions inconsistent with the Policy's "priorities." *Contact ICE*, https://perma.cc/RP5T-NNA3.

Second, the Policy is not among the rare administrative actions that is "committed to agency discretion by law." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); 5 U.S.C. §701(a)(2). The "strong presumption in favor of judicial review," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), ceases to apply only in "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). Sections 1226(c) and §1231(a)(1) provide standards clear enough to allow for the Policy's review.

Finally, the States have prudential standing to sue. "Under the Administrative Procedure Act, a party has prudential standing … if the interest he seeks to protect is 'arguably within the zone of interests to be protected or regulated by the statute that he says was violated.'" *Patel v. USCIS*, 732 F.3d 633, 635 (6th Cir. 2013). Because the States are suing to protect themselves from the costs of immigration underenforcement, and because those are precisely the costs §1226(c) and §1231(a)(1)(A) are designed to prevent, the States' interests are within the relevant zone of interests.

I.B. The States will likely prevail on the merits of their APA challenge for three reasons.

First, the Policy is "not in accordance with law." 5 U.S.C §706(2)(A). Again, §1226(c) and §1231(a)(1)(A) both impose mandatory duties, *Nielsen*, 139 S. Ct. at 969; *Johnson*, 141 S. Ct. at 2281, while the Policy forbids officials from fulfilling those duties in some circumstances.

Second, the Policy is arbitrary and capricious. §706(2)(A). Agencies must consider key aspects of the problems before them. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007). DHS ignored key aspects of the problem the Policy is supposed to address—namely, how best to prioritize agency resources. For example, DHS failed to consider the recidivism of aliens subject to §1226(c) and

§1231(a)(1)(A) in particular. It likewise failed to consider how its nonenforcement against these aliens, as opposed to non-prioritized aliens generally, would affect the States. To make matters worse, the agency's rationale is pretextual. DHS adopted the Policy not to improve immigration enforcement, but rather to secure through nonenforcement an immigration policy Congress would not approve. By giving pretextual reasons and ignoring key aspects of the problem before it, DHS acted arbitrarily and capriciously.

Finally, because the Policy binds immigration officers, it is a substantive rule that could validly be promulgated only through notice-and-comment rulemaking. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383, 385 (D.C. Cir. 2002). DHS did not engage in such rulemaking.

II. The remaining injunctive-relief factors—irreparable harm, substantial harm to others, and the public interest—support the award of injunctive relief. The States' injuries cannot be redressed later: their sovereign injuries are non-monetary, and DHS has sovereign immunity in damages actions regardless. That satisfies the irreparable-harm prong. The final two factors "'merge[]' … when the government is the defendant." *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). And both are satisfied when a plaintiff seeks to enjoin an illegal policy. *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237,

252 (6th Cir. 2006); *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (*per curiam*).

III. The District Court properly issued a nationwide injunction. Courts must "grant relief in a party-specific and injury-focused manner." 31 F.4th at 483 (Sutton, C.J., concurring). But no narrower injunction would redress the States' injuries: DHS could evade a state-specific injunction by releasing detained aliens upon removing them from a covered State's territory.

ARGUMENT

I. The States are likely to succeed on the merits.

A. The States have standing and the claims are reviewable.

DHS begins its brief by insisting that the States lack Article III standing and that the Policy is immune from APA review regardless. All of that is wrong.

1. The States have Article III standing to sue.

a. Plaintiffs have Article III standing if they suffer an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a favorable ruling. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). An injury in fact is "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation marks omitted). States are "entitled to special solicitude" throughout this analysis. *Massachusetts*, 549 U.S. at 520. Traceability and redressability are further relaxed in cases, like

this one, where States assert "procedural right[s]"—like the right to comment on proposed rules—"to protect [their] concrete interests." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

Injury. The Policy inflicts two injuries in fact on the States, one economic and the other sovereign in nature.

A "likelihood of economic injury" constitutes an injury in fact. *Clinton v. City of New York*, 524 U.S. 417, 432 (1998). The Policy imposes precisely this form of injury on all three States. Why? Because it causes a drop in immigration enforcement, including for criminal aliens, compared to the scheme contemplated by statute. *See above* 15–17. The Policy therefore increases the number of removable aliens within the States. The States will have to expend money providing services for these individuals, monitoring the criminal aliens who are not being arrested and detained as §1226(c) requires, and responding to the crimes these criminal aliens commit. *See MPP*, 20 F.4th at 967–69; *Texas v. United States*, 555 F. Supp. 3d 351, 375 (S.D. Tex. 2021) (*Texas II*); *Florida v. United States*, No.3:21-cv-1066, Doc. 45, at 13–15 (N.D. Fl. May 4, 2022).

Of course, not *every* remaining alien will impose costs. But that is irrelevant, because it is indisputable that the larger number of aliens will impose *some* costs. Plaintiffs have standing to challenge misconduct whenever it costs them any amount

of money—even "a dollar or two." *Sprint v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008). That is why the First Circuit recently held that Massachusetts had standing to challenge a federal rule permitting employers to opt out of providing contraceptive coverage. The opt-out would cause some women to use state funds to seek contraceptives or postnatal care, causing economic injury. *Massachusetts v. HHS*, 923 F.3d 209, 221–28 (1st Cir. 2019). Massachusetts could not identify a single woman who, because of the policy, would lose contraceptive coverage and need to rely on the State. But that made no difference, because "rational economic assumptions" pointed to a "substantial risk" that such women existed. *Id.* at 223 (quotation omitted). Along the same lines, the Fifth Circuit has held that challenges to "large-scale" immigration policies are "amenable to challenge using large-scale statistics and figures, rather than highly specific individualized documents." *MPP*, 20 F.4th at 971.

DHS argues that drastically reduced removals do not harm the States because DHS has increased border enforcement. DHS Br.22. That would not matter to the standing analysis even if it were true. The fact that an injurious policy might have offsetting benefits does not eliminate the injury. *DAPA*, 809 F.3d at 155–56; *MPP*, 20 F.4th 928; *New York v. DHS*, 969 F.3d 42, 59 (2d Cir. 2020); *NCAA v. Governor of New Jersey*, 730 F.3d 208, 223 (3d Cir. 2013), *abrogated on other grounds* by *Murphy*

v. NCAA, 138 S. Ct. 1461 (2018); *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 212 (4th Cir. 2020).

In any event, the claim that the States are better off overall because of the Policy denies reality. Security at the border has been substantially diminished. *See, e.g.,* Nick Miroff, *Border officials say more people are sneaking past them as crossings soar and agents are overwhelmed*, The Washington Post (April 2, 2021), https://perma.cc/Z9NX-K6LS. While DHS claims it is making more border arrests, DHS Br.22, that is hardly good news for the States. Unless those aliens are detained and removed, more border arrests means *even higher* numbers of illegal immigrants within the States. And interior enforcement has been undercut, too. *See above* 15–17. DHS's claim that it arrested "substantially more noncitizens convicted of aggravated felonies under the interim priorities," does nothing to help its case. DHS Br.23. First, as best the States can tell, DHS has not publicly tracked aggravated-felony arrests in prior years, leaving newly announced aggravated-felony arrest data without a reliable comparator. Second, "aggravated felons" are no longer a priority category in the Policy, so there is no reason to expect any such trend to continue. Third, as noted several times already, *removals* of dangerous criminal aliens are down markedly across all categories of crime.

Regardless of what one makes of the economic injuries, the Policy inflicts a sovereign injury, too. The "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part). And in addition to the inherent interest in excluding the excludable, migration undoubtedly affects the "health and well-being—both physical and economic—of [the States'] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Of the estimated 89,000 illegal migrants in Ohio, for example, half are uninsured, two-thirds live below 200 percent of the poverty level, and 92 percent of school-aged children attend school. Compl. ¶¶60–61, R.1, PageID#14. Unchecked migration does not impose a "humdrum" financial injury. 31 F.4th at 476. It strains the adequacy and availability of government services affecting the daily lives of citizens. *See also MPP*, 20 F.4th at 969 (as "the total number of in-State aliens increases, the States will spend more on healthcare").

Although *Arizona* held that the States lack authority to exercise the power to exclude from their territory aliens with no right to be there, it never denied that States have an interest in excluding these aliens. The fact that the States must rely on the federal government to protect that interest *bolsters* their case for standing. The President's obligation to "take Care that the Laws be faithfully executed," is in

the nature of a fiduciary duty, *see* Andrew Kent, et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2112, 2180 (2019); Ethan J. Leib and Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 Wm. & Mary L. Rev. 1297, 1300–05 (2021). When a fiduciary injuries a beneficiary by breaching its fiduciary duty, the beneficiary may sue. *See Scanlan v. Eisenberg*, 669 F.3d 838, 844–47 (7th Cir. 2012). The Policy, by neutering the executive branch's enforcement of immigration laws, breaches that duty and inflicts a sovereign injury on the States from which they cannot protect themselves.

The States here are situated similarly to the plaintiffs in *Massachusetts v. EPA*, 549 U.S. 497. There, the Bay State sued to make the federal government do something that States lacked the power to do: regulate greenhouse-gas emissions on a nationwide basis. *Id.* at 504–05, 519. Massachusetts alleged that the federal government's failure to regulate greenhouse gases would, or at least could, slightly increase the warming of the Earth, which would cause sea levels to rise, which would cause damage to the States' coastal territory. *Id.* at 518–23. This constituted an injury in fact. Precisely because the "sovereign prerogative[]" to regulate emissions was "lodged in the Federal Government," Massachusetts could sue to protect itself from the quasi-sovereign injury associated with rising seas. *Id.* at 519. The same logic applies here: precisely because the States lost their sovereign authority to police

illegal immigration, they can sue to make the federal government defend the sovereign interests it has the exclusive prerogative to address.

Fairly traceable. The injuries associated with nonenforcement are fairly traceable to the Policy. The District Court expressly so found. *See* R.44, PageID#1092–93. And that determination is not clearly erroneous, as record evidence shows that the Policy, rather than resource constraints or anything else, is leading to the nonapprehension of criminal aliens. *See, e.g.*, R.4-11, PageID#200; R.39-1, PageID#1002–03. "Article III requires no more than *de facto* causality," *Census*, 139 S. Ct. at 2566, and the States have made that showing.

Regardless, DHS cannot plausibly maintain that the Policy—which for the "first time" ever rejects a "categorical approach to enforcement" so as to better "advance the interests of justice," *New Immigration Enforcement Priorities*, https://perma.cc/Q429-4X8S—will increase the rate at which removable aliens are arrested and removed. Even if the Policy is not solely responsible for the drop in immigration enforcement, that is irrelevant. The EPA's failure to regulate greenhouse gases of motor vehicles at an undetermined stringency had an at-most-negligible effect on sea levels, yet the rising seas could still be fairly traced to the EPA. It is a mistake to conclude "that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." *Massachusetts*, 549 U.S. at 524. "That a first step

might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law." *Id.*

Redressable. Because the injuries are fairly traceable to the Policy, an order enjoining the Policy would redress those injuries to at least some extent. Because the injuries "would be reduced to some extent if [the States] received the relief they seek," the redressability prong is satisfied. *Id.* at 527.

b. A holding that the States lack standing to challenge the Policy would depart from the reasoning of every court to have considered the issue. *See* Op., R.44, PageID#1086–95; *Texas II*, 555 F. Supp. 3d at 373–385; *Arizona v. DHS*, 2021 WL 2787930, at *6 (D. Ariz. June 30, 2021); *Florida v. United States*, 540 F.Supp.3d 1144, 1155–56 (M.D. Fla. 2021), *vacated as moot* 2021 WL 5910702 (11th Cir. Dec. 14, 2021). More worrisome, it would leave States powerless to protect themselves from the President's failure to faithfully execute immigration laws.

This Court's stay-stage decision expressed "skeptic[ism]" of the States' standing. 31 F.4th at 477. But its reasoning rests on three errors.

First, and most significantly, the Court misunderstood how the Policy works. It observed that the federal government's decision "to remove or detain person A over person B does not establish that it will pursue fewer people, particularly with

respect to a Guidance that never *requires* agents to detain some noncitizens over others." *Id.* at 474. Maybe that is true, but it does not describe the Policy.

As an initial matter, the Court seemed to envision a discretionary step before §1226(c) and §1231(a) apply, noting that the States' injuries are really caused by "prosecutorial discretion at the front end when immigration agents and law enforcement decide whom to arrest and whom not to." *Id.* at 475. Under this two-step approach, which a now-vacated Fifth Circuit case embraced, §1226(c) and §1231(a) mandate arrest and removal only if DHS first decides to arrest or remove. *See Texas v. United States*, 14 F.4th 332, 337 (5th Cir. 2021), *vacated*, 24 F.4th 407 (*en banc*). Neither statute can be read to permit this first step. Section 1226(c), for its part, mandates arresting and removing covered aliens. *Nielsen*, 139 S. Ct. at 970. Reading a mandatory-arrest statute to apply only when an agent decides to arrest would make it inoperative. Section 1231(a), for its part, requires the removal within 90 days of most aliens with final orders of removal. This, too, is a mandate. *Johnson*, 141 S.Ct. at 2281; *Larose*, 968 F.3d at 561. A mandate that DHS could ignore would be no mandate at all. Consistent with these observations, DHS has repeatedly acknowledged it must arrest and remove §1226(c) aliens, and that it must remove §1231(a) aliens. Genco Op. No. 93-80, 1993 WL 1504027, at *3; Pet. Br., *Nielsen*, 2018 WL 2554770, at *17, *23; Oral Arg., *Pham v. Guzman-Chavez*, 2021 WL 134137, at *14

(U.S. Jan. 11, 2021); Oral Arg., *United States v. Texas*, 2016 WL 1558712, at *21 (U.S. Apr. 18, 2016). There is no discretionary step that precedes arrest and removal.

Beyond this, the Court erred when it said the Policy "never *requires* agents to detain some noncitizens over others." 31 F.4th at 474. Again, the Policy prohibits all arrests and removals that it does not permit—agents cannot arrest remove an individual unless the removal accords with the Policy. *See above* 12–15. This means agents are prohibited from making some arrests and some removals even if they could effect the arrests or removals without diverting any resources from higher-priority aliens. The States can challenge that prohibition. While no one has any "judicially cognizable interest in the prosecution or nonprosecution of another," DHS Br.20 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)), States have judicially cognizable interests in avoiding economic and sovereign injuries. And they can sue to challenge nonenforcement policies that inflict such injuries. *DAPA*, 809 F.3d at 155–61; *see, e.g.*, *Texas II*, 555 F. Supp. 3d at 375; *Arizona*, 2021 WL 2787930, at *7. That is all the States are doing here.

Perhaps it was logically possible that the Policy would not cause the agency to "pursue fewer people." 31 F.4th at 474. But the enforcement numbers, along with other record evidence, *see* R.4-11, PageID#200; R.39-1, PageID#1002–03, establish that the Policy is having precisely that effect. *See* Op., R.44, PageID#1090–93.

Second, the Court erred when it suggested that the States' standing arguments impermissibly rest on assumptions about third-party behavior. It "is impossible to maintain … that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J., writing for the court). And today, parties have standing to challenge a policy that will inflict injury via the "predictable" actions of "third parties," even if those third-party actions are criminal. *Census*, 139 S. Ct. at 2566. Thus, the stay-stage decision erred when it said a "theory of injury grounded in rising crime rates" is impermissible because "it would 'hinge' on third parties committing more crimes." 31 F.4th at 477 (quotation omitted).

DHS cannot honestly believe that the "effects" a policy has "on [state] expenditures" are insufficient to establish an injury in fact. DHS Br.16. The Supreme Court has repeatedly treated the need to expend greater funds as an injury in fact. *See Census*, 139 S. Ct. at 2565; *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979). True, this theory requires the States to show that the Policy will *predictably* cause third parties to act in an expenditure-enhancing way. But the States did that. DHS has acknowledged that arrested criminal aliens have higher-than-typical rates of recidivism, 2019 ERO Report at 12. Because the Policy has and will reduce enforcement against aliens prone to recidivate, it will cause more crime. Plus, the

States' standing arguments do not rest exclusively or even primarily on recidivist crime. Instead, they rest on community-supervision costs the States will sustain when aliens are released into their communities instead of being removed. Op., R.44, PageID#1139.

The predictability of these costs, incidentally, distinguishes *Arpaio v. Obama*, 797 F.3d 11. (So does the fact that this case, unlike *Arpaio*, implicates sovereign injuries.) DHS claims that case rejected a "materially identical theory of standing." DHS Br.24. Not so. Sheriff Arpaio's argument for standing rested on unsupported (and likely unsupportable) speculation. He posited that the challenged immigration policy might somehow spur the migration of aliens to whom it did not apply, and suggested that the policy might increase crime rates in the Sheriff's district even though it required the administration to "remove *more* criminals." 797 F.3d at 15, 21–24. This case involves no such speculation. Instead, it involves logically coherent, record-supported claims that the Policy will require the States to expend money. That is precisely what *Arpaio* said *would* suffice to establish standing. *Id.* at 23.

Third, the stay-stage decision undervalued the States' sovereign injuries. It acknowledged that States get special solicitude in the standing analysis when they "invoke[] a desire 'to safeguard [their] domain and [their] health, comfort, and welfare.'" 31 F.4th at 476 (quoting *Kentucky v. Biden*, 23 F.4th 585, 596 (6th Cir. 2022)).

That describes this case. The States sued to protect their territorial integrity, along with the health, comfort, and welfare of their citizens, from a harm (illegal immigration) that they would address themselves if they could. Put differently, the States are not seeking redress for "peripheral costs." *Id.* Instead, they are seeking redress for judicially cognizable sovereign and economic injuries that can be fairly traced to the Policy.

2. The Policy is reviewable.

Assuming the States have standing, the Court can hear this challenge to the Policy.

Final agency action. The APA permits review of "final" agency actions. A "final agency action" is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes*, 578 U.S. at 597 (citing *Bennett*, 520 U.S. at 177–78). The finality inquiry is "pragmatic." *Id.* at 599 (quotation omitted). An agency action can be final even if it binds only the agency and even if no one can bring an action for failure to comply. *Id.* at 598–600. In other words, if an agency's "statement denies the decisionmaker discretion … then the statement is binding, and creates rights or obligations." *Gen. Elec.*, 290 F.3d at 382 (quoting *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988)).

The Policy is a final agency action for at least two reasons. First, as already addressed, it binds immigration officers. The Policy prohibits officers from deciding to enforce immigration laws against an alien based exclusively on his inclusion within §1226(c) or §1231(a)(1). *See above* 12–15; *accord Texas II*, 555 F. Supp. 3d at 391. True, the Policy contains some language that sounds discretion-conferring. For example, it purports not to "compel an action to be taken or not taken." R.4-1, PageID#102. But self-serving characterizations of this sort are irrelevant when they contradict reality. For example, the memorandum that created the "DAPA" program purported to provide mere "guidance for case-by-case use of deferred action." Mem. from Jeh Johnson, Sec'y, DHS, to Leon Rodriguez, Dir., USCIS, et al. 3 (Nov. 20, 2014), https://perma.cc/HK7F-YRX2. But because the memorandum had a "binding effect on agency discretion," it qualified as a reviewable final agency action. *DAPA*, 809 F.3d at 171 (quotation omitted). Similarly, although the "DACA" program purported to create no rights on which recipients could rely, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1931 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part), the Supreme Court held that the program *did* cause certain rights to vest in recipients, *see id.* at 1906–07 (majority op.). The same logic applies here: while the Policy at times uses language suggesting that it imposes

no obligations or prohibitions on officers, in reality it prohibits enforcement actions that do not comport with the Policy.

In sum, the Policy "prevent[s] … government actors from pursuing [some] particular course[s] of action." *Parsons v. DOJ*, 878 F.3d 162, 167 (6th Cir. 2017). That makes it a final agency action. *Id.* at 167–68; *contra* DHS Br.26.

In any event, the Policy also creates legal rights for illegal immigrants, who may seek review of their cases if they face enforcement actions that contradict the "priorities for enforcement." *Contact ICE*, https://perma.cc/RP5T-NNA3. In this way too, the Policy creates "rights or obligations" and qualifies as final agency action. *Hawkes*, 578 U.S. at 597

Committed to agency discretion. The APA creates a "strong presumption in favor of judicial review." *St. Cyr*, 533 U.S. at 298. A "very narrow exception" to the presumption in favor of judicial review exists when an action is "committed to agency discretion by law." *Overton Park*, 401 U.S. at 410; 5 U.S.C. §701(a)(2). But "to honor the presumption of review," the Supreme Court reads that exception "quite narrowly." *Weyerhaeuser*, 139 S. Ct. at 370. More precisely, the exception applies only in "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's

exercise of discretion." *Id.* (quoting *Lincoln*, 508 U.S. at 191); *Barrios Garcia v. DHS*, 25 F.4th 430, 445–46 (6th Cir. 2022).

The States might have a harder time seeking review of any *particular* nonenforcement decision by DHS. The Court has recognized a presumption against reviewability for an "agency's decision not to prosecute or enforce" a particular individual. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). But *Heckler* is irrelevant here, because the States are challenging a broad nonenforcement policy as opposed to a discrete nonenforcement decision. *Heckler* does not bar such challenges. *MPP*, 20 F.4th at 978–88; *see also Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 485 (D. Md. 2019); *Pub. Citizen Health Rsch. Grp. v. Acosta*, 363 F. Supp. 3d 1, 18 (D.D.C. 2018). The States are not aware of any decision in any circuit saying otherwise.

DHS argues its discretion is particularly broad in the immigration context. DHS Br.29–31. This abstract principle has no bearing on the States' challenge regarding two statutes intended to constrain DHS's discretion. Perhaps sensing that, DHS points to 8 U.S.C. §1252(g), which says "no court shall have jurisdiction to hear any cause or claim *by or on behalf of an alien* arising from the decision or action by [DHS] to commence proceedings, adjudicate cases, or execute removal orders." (Emphasis added). This statute is aimed at stopping the "deconstruction, fragmentation, and hence prolongation of removal proceedings." *Reno v. Am.-Arab Anti-*

Discrimination Comm., 525 U.S. 471, 487 (1999). And as the italicized language shows, this statute has no application to this suit, which was brought by States (rather than "an alien") and challenges a nonenforcement policy (rather than the commencement or adjudication of proceedings).

Prudential standing. The prudential standing doctrine is on its last legs, but still upright for now. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). "Under the Administrative Procedure Act, a party has prudential standing if he is 'adversely affected or aggrieved by agency action.'" *Patel*, 732 F.3d at 635 (quoting 5 U.S.C. §702). "A party is 'adversely affected or aggrieved' if the interest he seeks to protect is 'arguably within the zone of interests to be protected or regulated by the statute that he says was violated.'" *Id.* (quotation omitted). The test is not "especially demanding," given the APA's presumption of review, and the "benefit of any doubt goes to the plaintiff." *Id.* (quotation omitted). A plaintiff lacks prudential standing only if his interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

The States' interests in this suit—protecting themselves from the costs of less-than-vigorous immigration enforcement—are precisely the same interests that

Congress passed §1226(c) and §1231(a) to address. *See above* 7–11; *Demore*, 538 U.S. at 518; *see also Hernandez-Avalos v. INS*, 50 F.3d 842, 847–48 (10th Cir. 1995). The zone-of-interests test is satisfied.

Section 1252(b)(9) is not to the contrary. *Contra* DHS Br.33. It says: "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 … shall be available only in judicial review of a final order …." (Emphasis added). This statute limits review of issues bearing on *particular* removal decisions. It is "certainly not a bar" to APA suits challenging broadly applicable immigration policies. *Regents*, 140 S. Ct. at 1907.

B. The States will prevail under the APA.

Under the APA, this Court "shall … set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The Policy is both contrary to law and arbitrary and capricious. The States will therefore prevail in their APA challenge.

1. The Policy is not in accordance with law.

Two statutes, 8 U.S.C. §1226(c)(1) and §1231(a)(1)(A), say that DHS "shall" take enforcement actions against certain specified aliens. The Policy, in contrast, *forbids* field officers from taking these actions based on an alien's eligibility for

removal under these statutes. Instead, it permits enforcement against covered aliens only if various extra-statutory factors support enforcement. By prohibiting officers from taking enforcement actions that Congress requires them to take, the Policy is contrary to law.

a. Section 1226(c)(1).

Section 1226(c)(1) says that ICE "shall take into custody," specified aliens—including aliens convicted of crimes of moral turpitude, drug crimes, aggravated felonies, firearm offenses, espionage, and human trafficking—upon their release from criminal custody. 8 U.S.C. §1226(c)(1). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). It is no surprise, then, that Congress thought it was enacting a "detention mandate." H.R. Rep. No. 104-828, at 210–11 (1996) (Conf. Rep.). Nor is it a surprise that the Supreme Court has interpreted it accordingly. Under §1226(c), "aliens *must be* arrested 'when [they are] released' from custody on criminal charges," and they must subsequently be detained. *Nielsen*, 139 S. Ct. at 959 (alterations in original, emphasis added); *accord id*. at 966.

Statutory context bolsters the point. A different subsection in §1226 says that, "[o]n 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." §1226(a) (emphasis added). Generally speaking, "the use of different terminology in adjoining sections suggests that Congress utilized the specific terms intentionally." *Sanders v. Allison Engine Co.*, 703 F.3d 930, 936 (6th Cir. 2012). While that principle readily yields to context, Congress's use of the antonyms "may" and "shall" strongly implies a difference in meaning.

*

The Policy flagrantly violates this mandatory duty. For aliens suspected of terrorism or espionage, the Policy allows categorical prioritization. R.4-1, PageID#100; 8 U.S.C. §1226(c)(1)(B), (D). That accords with the statute. But for aliens who pose a threat to public safety, the Policy turns "shall" into "shall not" in certain applications. It prohibits "bright lines or categories," and "requires an assessment of the individual and the totality of the facts and circumstances." R.4-1, PageID#100. ICE officers are not allowed to "rely on the fact of conviction" as justification for arrest and detention. *Id.* at PageID#101. Instead, they can arrest and remove an alien whose arrest and removal §1226(c) mandates *only if* the extra-statutory factors in the Policy are satisfied.

In sum, the Policy forbids at least some arrests that §1226(c) mandates. Consider an example. Suppose an officer arrives at a state prison with an empty bus. Suppose the State is set to release two individuals, the first a terrorist and the second

an armed burglar. The Policy requires arresting the first. Assume the Policy's extra-statutory factors do not support arresting the second. Can the official arrest and detain the individual anyway, as §1226(c) requires? No. Even if the officer could arrest that individual without any further effort and without straining DHS's resources, he is prohibited from making an arrest inconsistent with the Policy. By imposing barriers to the apprehension of aliens whose apprehension and detention Congress made mandatory, the Policy violates the law.

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This Court's stay-stage decision suggested that the Policy complies with §1226(c). 31 F.4th at 479–80. But its reasoning, which DHS now adopts, is flawed.

First, the Court treated the Policy as though it leaves individual officers free to enforce §1226(c) against all covered aliens. In fact, the Policy prohibits officers from arresting a covered alien unless the extra-statutory review process the Policy requires supports arrest and removal. *See above* 12–15. The States do not quarrel with the fact that DHS has limited resources and is probably incapable of fulfilling its duty as to every covered alien. 31 F.4th at 480–81. They concede that, as a result, DHS officers must exercise discretion in deciding whom to arrest. And they take no issue with DHS's guiding that discretion with prioritization schemes (provided those schemes accord with statute). What the States object to is this: the Policy,

instead of simply announcing priorities to guide independent decisionmaking, affirmatively prohibits officials from acting in a manner that is statutorily required, even if they can do so without diverting resources away from priority-category aliens. *That* is why the Policy is contrary to law.

Second, the Court deemed the Policy consistent with §1226(c) based in part on its misunderstanding of §1226 more broadly. Its argument started from the premise that §1226(c) "does not say how long [aliens] must remain in custody or even ensure they must immediately be taken into custody." 31 F.4th at 480. Those matters, it thought, were covered by §1226(a), which allows for arrest and detention "pending a decision on whether the alien is to be removed." It seemingly reasoned that, because DHS can decide at any point not to bring removal proceedings, it need not take §1226(c) aliens into custody or detain them at all.

The premise of this argument is false. Section 1226(c) *does* require immediate apprehension and *does* dictate the length of custody. Subsection (c)(1) requires DHS to apprehend covered aliens immediately "upon release from criminal custody." *Nielsen*, 139 S. Ct. at 969. Subsection (c)(2), forbids DHS from allowing the "release" of covered aliens except in very narrow circumstances. *Id.* at 960 (quoting §1226(c)(2)). Together, these two subsections require immediate arrest and (except in narrow circumstances) detention for as long as it takes to remove the alien. And

because these subsections specifically govern the arrest and detention of criminal aliens, they prevail over subsection (a), which governs arrest and detention of aliens generally. *See* Scalia & Garner, *Reading Law* §28, p.183 (2012). (Incidentally, the General/Specific Canon also defeats DHS's argument that 6 U.S.C. §202(5), which generally permits the Secretary to set enforcement priorities, allows for the adoption of priorities inconsistent with §1226 or §1231. *See* DHS Br.30.)

Because the Policy is inconsistent with §1226(c) insofar as that statute mandates arrest, DHS tries to show that "shall" really means "may." It relies heavily on the "basic principle," 31 F.4th at 480, that at "each stage [of the deportation process] the Executive has discretion to abandon the endeavor," *Reno*, 525 U.S. at 483; *accord* DHS Br.30. But that "basic principle" is just a background rule from which Congress can depart. That is what it did with §1226(c) and §1231(a), which require the arrest and removal of covered aliens. *Nielsen*, 139 S. Ct. at 969; *Johnson*, 141 S. Ct. at 2281.

It is true that a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005). Thus, even "seemingly mandatory legislative commands" in criminal statutes are *presumed* to leave officers with discretion not to enforce the law on a case-by-case basis. *Id.* at 761. But legislatures can rebut that presumption

with a "strong[] indication" of their intent to do so. *Id.* The text, context, and historical evolution of immigration laws, *see above* 7–11, *Demore*, 538 U.S. at 518, supply that strong indication here, which is why the Supreme Court has interpreted both §1226(c) and §1231(a)(1) as mandates. *Nielsen*, 139 S. Ct. at 969; *Johnson*, 141 S. Ct. at 2281.

DHS acknowledges that Congress can create mandates in the immigration space. But it says Congress must use terms like "only if" or "under no circumstance." This argument aligns with the stay-stage opinion which, based on §1231(a)(2), suggested that the word "shall" in §1226(c)—and §1231(a)(1)(A)—might mean "may." Section 1231(a)(2) "says that, '[during] the removal period, 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' for the same types of offenses captured by §1226(c)." 31 F.4th at 481. The Court claimed that, "[h]aving argued that the juxtaposition between the 'may' and 'shall' language in the two statutes supports its position, the States must acknowledge that the juxtaposition between the 'shall' and 'under no circumstance' language supports the Department's position." *Id.*

The States make no such acknowledgment. No "canon of interpretation … forbids interpreting different words used in different parts of the same statute to

mean roughly the same thing." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013). The may-versus-shall distinction discussed above matters not because the words are different, but rather because the two words are most commonly used as antonyms, making their juxtaposition especially stark. (If an overly formal parent told his child, "you shall do your homework and, you may do it at the kitchen table," the child would not mistake the first half of that statement for a suggestion or the second half for a command.) In contrast, "shall" and "under no circumstance" are commonly used as synonyms and even complements. ("You shall not, under any circumstance, fail to do your homework.") Section 1231(a)(2) itself uses the two words in this way: it says the Attorney General "shall detain the alien" and "[u]nder no circumstance" release him. If anything "under no circumstance" makes "shall detain" more clearly directive, because it is impossible to keep someone detained who was never detained in the first place. All told, Congress's use of "under no circumstance" does not suggest that the word "shall," when used in the same statute (§1231(a)) or an entirely different statute (§1226(c)), means "may."

"Congress need not add 'we really mean it!' to make statutes effectual." *Bormes v. United States*, 759 F.3d 793, 796 (7th Cir. 2014). And it is hard to see how Congress could have been much clearer about the mandatory character of §1226(c). After all, its use of "shall" is mandatory in exactly the same way as other provisions

no one could mistake for suggestions. (Consider this one: "Congress shall make no law respecting an establishment of religion … or abridging the freedom of speech.") And it used "shall" alongside sections containing the permissive "may," all with the objective purpose of trying to get the executive branch to vigorously enforce immigration law. *See above* 7–11.

b. *Section 1231(a)(1).*

Congress enacted §1231(a)(1) to fix a very particular problem: the government was not removing aliens who had already received removal orders. The predecessor statute allowed the Attorney General six months to "effect" an alien's final order of departure, which the alien could delay by seeking judicial review, and granted the Attorney General "discretion" whether to detain the alien during that time. 8 U.S.C. §1252(c) (1994).

Section 1231(a)(1) fixed that by requiring that ICE "shall remove" an alien with a final order of removal within 90 days. Another subsection governs detention during that period. "During the removal period, the Attorney General shall detain the alien." 8 U.S.C. §1231(a)(2). And although the statute does allow for the release of aliens in limited instances, *e.g.*, §1231(c)(2)(A), (C), DHS may not release certain criminal aliens under any circumstance, §1231(a)(2).

"Shall," as used in §1231(a)(1)(A), is mandatory for the same reasons it is mandatory in §1226(c). Thus, the statute requires removal, within 90 days, of aliens with final orders of removal. The Supreme Court has said so expressly, rejecting an argument that the "practical[] impossib[ility]" of removing all aliens within that timeframe makes "shall" permissive. *Johnson*, 141 S. Ct. at 2291. While the remainder of §1231 provides for supervised release or prolonged detention to deal with cases where immediate removal is impractical, *id.*, the statute gives DHS no discretion to simply treat aliens with final orders of removal as if they face no removal deadline at all. *See Larose*, 968 F.3d at 561 (§1231 is mandatory); *United States v. Barrera-Landa*, 964 F.3d 912, 922 (10th Cir. 2020) (same). Indeed, the fact that §1231(a)(1)(A) requires removal within 90 days "[e]xcept as otherwise provided" in §1231 drives home the statute's mandatory nature: by expressly recognizing some exceptions to the 90-day-removal rule, it impliedly rejects the existence of others.

*

The Policy violates §1231(a)(1). Aliens with final orders of removal are not even a priority category. And so ICE officers can remove these individuals *only if* they come within one of the priority categories—officers cannot rely simply on the existence of a final order of removal. *See above* 12–15. As Secretary Mayorkas confirmed to the Senate, aliens who are ordered removed after having been afforded

tremendous process during their immigration proceedings now receive *de novo* review of the question whether they ought to be removed. *See* Department of Homeland Security Oversight Hearing, CSPAN (Nov. 16, 2021), http://tinyurl.com/DHSHear (interaction with Senator Grassley, at 42:26).

The Policy turns the mandatory 90-day-removal period into a rarely observed suggestion. While Congress defined "removal period" to mean 90 days, the Policy implements the statute as though it said: "DHS may remove the alien within 90 days, after 90 days, or never." The time limitation has no meaning if removals are committed to DHS's sole and unreviewable discretion. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002).

*

The contrary arguments fail. It is true that "Congress itself appreciated that removal would not always occur within 90 days," and that it subjected aliens not timely removed to supervised release. 31 F.4th at 480 (citing §1231(a)(3)); DHS Br.37. But that does not change the law's mandatory character. *Johnson*, 141 S. Ct. at 2291. Laws often detail what will happen if an actor fails to discharge one of its duties. The Constitution, for example, says that the President "shall" either sign or veto all bills passed by Congress—but it also says what happens if he does nothing. Art. I, §7, cl.2. And even though §1226(c) imposes a "mandatory-detention

requirement," *Nielsen*, 139 S. Ct. at 959, the law permits DHS to detain later an alien it failed to detain immediately, *id.* at 967 (plurality op.). Congress's providing a backup option in §1231 does not make DHS's removal duty discretionary; it recognizes the reality that it is unlikely "all reasonably foreseeable removals could be accomplished" on Congress's timeline. 31 F.4th at 480 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)).

The States understand that a "statutory deadline" might be mandatory but judicially unenforceable. 31 F.4th at 480–81 (quoting *Nielsen*, 139 S. Ct. at 969 n.6). But they are not suing to enforce the deadline in a particular case or even in a particular class of cases. Nor are they suing to *prohibit* the government from fulfilling a statutory duty on the ground that it missed the deadline for doing so—the issue in *Nielsen*. Instead, they are challenging a policy that unlawfully precludes officials from removing many aliens with final orders of removal within a certain timeframe, notwithstanding a statute requiring timely removal. That challenge to an unlawful administrative rule, as opposed to an unlawful failure to comply with a deadline in particular instances, falls within the heartland of the APA. It is therefore judicially cognizable.

The rest of the stay-stage opinion's §1231(a) analysis (which DHS incorporates) overlapped with its §1226(c) analysis, which the States addressed above.

2. The Policy is arbitrary and capricious.

Even if the Policy were not contrary to law, the Court would have to set it aside as arbitrary and capricious. 5 U.S.C. §706(2)(A).

a. An agency's decision is arbitrary or capricious where 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." *Sierra Club v. United States Forest Serv.*, 828 F.3d 402, 407 (6th Cir. 2016) (quoting *Nat'l Ass'n of Home Builders*, 551 U.S. at 658).

An agency's "statement that it considered this or that factor" is not "enough to avoid any arbitrary-and-capricious problems." *Texas v. Biden*, 10 F.4th 538, 555 (5th Cir. 2021) (*per curiam*). Put differently, "[s]tating that a factor was considered ... is not a substitute for considering it." *Id.* at 556 (quoting *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986)). While agencies need not make formal findings, they "must provide the court an explanation sufficient to allow [it] to properly carry out [its] review." *Getty*, 805 F.2d at 1055. "Cryptic assertions" do not suffice. *Id.* (capitalization altered). And neither "conclusory recitation[s]," *id.* at 1057, nor unreasoned or unsupported assertions pass muster either, *see*

Susquehanna Int'l Grp., LLP v. SEC, 866 F.3d 442, 447 (D.C. Cir. 2017)*; Gerber v. Norton*, 294 F.3d 173, 186 (D.C. Cir. 2002).

Courts must review agencies' real reasons for acting. "Accepting contrived reasons would defeat the purpose of the enterprise" and turn judicial review into "an empty ritual." *Census*, 139 S. Ct. at 2576. Administrative rules thus flunk arbitrary-and-capricious review when they rest on pretextual justifications. *Id.*

b. DHS failed to engage in reasoned decisionmaking.

First, it failed adequately to consider the problems of recidivism associated with aliens who are removable under §1226(c) but not removed under the Policy. It came closest when it suggested that the Policy could help DHS target aliens more likely to recidivate. Considerations Memo, R.27-2, PageID#454–55; *see also* 31 F.4th at 481; DHS Br.40–41. But that conclusory assertion is insufficient, because it fails to consider the very specific problem at issue: What will be the effects of recidivism associated with criminals *covered by §1226(c)*? ICE itself previously determined that criminal aliens are likely to recidivate. 2019 ERO Report at 12. DHS never addressed that recent finding, which is a problem all its own. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It instead pointed to an irrelevant study that assessed the crime rates of aliens generally, as opposed to criminal aliens in particular. Op., R.44, PageID#1125, Considerations Memo, R.27-2, PageID#455. Because

DHS ignored the key question and relied on irrelevant data, it engaged in arbitrary and capricious decisonmaking. The District Court was not "nitpick[ing]" by pointing out these problems. DHS Br.43. It was insisting upon the reasoned decisonmaking the APA requires.

Second, DHS failed adequately to consider the costs that the non-removal of aliens subject to §1226(c) and §1231(a)(1)(A) would impose on the States. In its Considerations Memo, DHS claims the Policy will have a "net positive effect" on States. R.27-2, PageID#457. But how, precisely, does the Policy benefit the States with respect to the particular aliens at issue here: criminal aliens subject to §1226(c) and aliens with final orders of removal subject to §1231(a)? Is there any plausible argument that the States are better off when fewer criminal aliens are arrested and removed? Likely not, but there is no way to know because DHS failed to consider the issue. The deference required in arbitrary-and-capricious challenges "does not mean" this Court's "review must also be inconsequential." *Helfman v. GE Grp. Life Assur. Co.*, 573 F.3d 383, 396 (6th Cir. 2009) (quotation omitted). Allowing these "conclusory recitation[s]" to carry the day would turn arbitrary-and-capricious review into an empty ritual. *Getty*, 805 F.2d at 1057.

Finally, there is the pretext problem. Recall that the Policy goes well beyond providing non-binding guidance on priorities. It affirmatively prohibits officials from

making arrests and removals inconsistent with its terms. What could possibly justify a prohibition like that? Surely not public safety. Indeed, with the Policy in place, removals of serious criminal aliens have dropped. Vaughan, *Deportations Plummet*, https://perma.cc/U8YJ-BT76. Across all categories of crime—including homicide, aggravated assault, burglary, kidnapping, robbery, and sexual assault—removals of dangerous aliens are down. *Id.* And, under the Policy, 93.5 percent of individuals detained in the interior are convicted criminals or had pending criminal charges. FY22 Detention Statistics (view Detention FY22 tab, rows 20 through 22, column B). That percentage is the same as it was under past policies. At the end of fiscal year 2019, for example, 90 percent of then-detained aliens were convicted criminals or had pending criminal charges. FY19 Detention Statistics (view Detention FY19 tab, rows 20 through 22, column B). So the Policy is leaving unchanged the composition of criminal aliens arrested and removed, while at the same time reducing the number of arrests and removals. That is hardly indicative of an enforcement regime committed to targeting the worst of the worst.

The States ask again: What possibly could explain DHS's decision to tie officers' hands in this way? Every "ordinary citizen[]" knows the answer. *Census*, 139 S. Ct. at 2575. DHS (and DOJ, for that matter) has embraced a "view about crime and punishment that is ascendant in some quarters," *United States v. Haymond*, 139

S. Ct. 2369, 2400 (2019) (Alito, J., dissenting), but inconsistent with federal law in this instance. DHS is securing by abdication that which it cannot win through legislation.

3. The Policy required notice and comment.

DHS promulgated the Policy without undertaking notice-and-comment rulemaking. It erred.

Generally speaking, substantive or legislative rules—rules that affect "individual rights and obligations"—must be promulgated through notice-and-comment rulemaking. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). In contrast, agencies may issue "general statements of policy" and "rules of agency organization" without notice-and-comment rulemaking. 5 U.S.C. §553(b)(A). The label an agency assigns to its action is not dispositive. "If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law." *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666–67 (D.C. Cir. 1978); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).

The Policy is a binding rule. As explained above, it prohibits agents from enforcing immigration laws if doing so would contradict the Policy. And in addition to binding agents, the Policy confers rights on aliens. They can use their non-priority

status to challenge enforcement actions against them. *See Contact ICE*, https://perma.cc/RP5T-NNA3.

Because the Policy is a substantive rule, DHS illegally promulgated it outside of notice-and-comment rulemaking.

II. The remaining factors favor issuance of an injunction.

The remaining injunctive-relief factors favor affirmance. Start with irreparable harm. The States' injuries are *per se* irreparable, because the United States' sovereign immunity will bar any future damages award. 5 U.S.C. §702; *United States v. City of Detroit*, 329 F.3d 515, 520–21 (6th Cir. 2003); *Kentucky v. United States*, 759 F.3d 588, 599–600 (6th Cir. 2014). In any event, the threats to public safety and the sovereign injuries the Policy inflicts are not redressable with money.

"As for the remaining parts of the preliminary-injunction analysis, the public-interest factor 'merges' with the substantial-harm factor when the government is the defendant." *Daunt*, 956 F.3d at 422 (quoting *Nken*, 556 U.S. at 435). Both support issuance of an injunction, because "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 Defend Affirmative Action*, 473 F.3d at 252 (internal quotation marks omitted). While DHS might insist that its illegal actions will have

positive effects, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Realtors*, 141 S. Ct. at 2490.

III. The injunction was not overbroad.

The District Court properly awarded a nationwide injunction. Courts must "grant relief in a party-specific and injury-focused manner." 31 F.4th at 483 (Sutton, C.J., concurring). That generally counsels against nationwide injunctions. *Id.* Not here. A state-specific injunction allowing agents to arrest and detain covered aliens in only some States will not prevent DHS from releasing those same aliens upon crossing state lines. Given DHS's demonstrated commitment to not enforcing immigration laws, that is what it would do. Such an injunction would not fully redress the States' injuries: ICE officials in the plaintiff States are not likely to arrest aliens if they know their principals will release the same aliens a few hours or days later. Unless the Policy is enjoined in all its applications, it will continue to injure the States

DHS's suggestion that 8 U.S.C. §1252(f)(1) prohibits enjoining immigration policies, *see* DHS Br.48, is wrong. That statute largely forbids courts from "enjoin[ing] or restrain[ing] the operation of the provisions of part IV of this subchapter"—the part that includes §1226(c) and §1231(a). But the States did not sue to enjoin, and the District Court did not enjoin, the operation of either statute. Instead,

this suit seeks to enjoin an administrative policy that thwarts the operation of those statutes. So §1252(f)(1) is irrelevant.

In any event, DHS waived this argument by failing to raise it below. Although arguments pertaining to subject-matter jurisdiction cannot be waived, §1252(f) does not speak to subject-matter jurisdiction. While it uses the word "jurisdiction," that "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quotation omitted). Section 1252(f)(1) addresses the power ("jurisdiction") to enter an injunction—it limits the relief available to plaintiffs. *Reno*, 525 U.S. at 481–82; *Nken*, 556 U.S. at 431. It does not address the courts' power to adjudicate any case or set of cases, and so does not speak to subject-matter jurisdiction. *Steel Co.*, 523 U.S. at 90.

CONCLUSION

The Court should affirm.

May 18, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 12,995 words. *See* Fed. R. App. P. 32(a)(7).

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the District Court's electronic records:

***State of Arizona, et al. v. Biden, et al.*, 3:21-cv-314-MJN**

Date Filed	R. No.; PageID#	Document Description
11/18/2021	R.1; 14	Complaint
11/23/2021	R.4; 55–97	Motion for Preliminary Injunction
11/23/2021	R.4-1; 99–102	Anti-enforcement Policy
11/23/2021	R.4-11; 200	Carter Declaration
11/23/2021	R.4-18; 35	Homan Declaration
12/27/2021	R.27-2; 454–57	Considerations Memo
12/27/2021	R.27-5; 485–87	Morton Memorandum
12/27/2021	R.27-7; 497–99	Johnson Memorandum
12/27/2021	R.27-8; 502	Kelly Memorandum
12/27/2021	R.27-9; 508–09	Pekoske Memorandum
12/27/2021	R.27-10; 515–17	February 18 Memorandum
2/9/2022	R.39-1; 1002–03	Email re lifted detainers
3/22/2022	R.44; 1119–39	Order Denying Motion to Dismiss and Granting Motion for a Preliminary Injunction
3/28/2022	R.48; 1156–58	Notice of Appeal
3/28/2022	R.49-1; 1198–99	Bible Declaration