UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND CONTINUED ADMINISTRATIVE STAY

Defendants hereby move for a stay pending appeal of the Court's June 10, 2022, Final Judgment, ECF No. 241, which vacated in full the September 30, 2021, Department of Homeland Security ("DHS") Memorandum (the "September Guidance"). In addition, Defendants request a continuation of the administrative stay, thus preserving the status quo, while this Court considers this stay motion and seven days thereafter.[1] This Court should especially extend the administrative stay to allow for consideration of today's Supreme Court decision in *Aleman Gonzalez*, No. 20-322, and the forthcoming *MPP* decision in *Biden* v. *Texas*, No. 21-954. Plaintiffs oppose the requested relief.

The Fifth Circuit requires motions for emergency relief be filed no later than 2:00 pm on a given day for that motion to be considered filed that day. 5th Cir. R. 27.3. Given the upcoming expiration of the current administrative stay, Defendants therefore advise the Court that they intend to seek emergency relief from the Fifth Circuit by 2:00 pm, June 14, 2022, if the Court does not grant either a stay pending appeal by that time or extend the administrative stay in the meantime.

[1] The Court's opinion, ECF No. 240, does not expressly address Defendants' earlier request to stay any relief pending appeal. *See* Defs.' Post-Tr. Mem. at 30-36 (ECF No. 223). *Cf.* Fed. R. App. Pr. 8.

A stay of this Court's judgment is warranted, for multiple reasons. Most courts, including all Courts of Appeal, that have addressed the merits of related challenges reached different legal conclusions than this Court. *Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022); *Texas v. United States*, 14 F.4th 332, 338-39, *vacated*, 24 F.4th 407 (5th Cir. 2021); *Florida v. United States*, No. 8:21-CV-541-CEH, 2021 WL 1985058 (M.D. Fla. May 18, 2021); *Arizona v. U.S. Dep't of Homeland Sec.*, No. CV-21-00186-PHX-SRB, 2021 WL 2787930 (D. Ariz. June 30, 2021); *Arizona v. United States*, Case No. 21-16118 (9th Cir. Sept. 3, 2021); *but see Arizona v. Biden*, No. 3:21-CV-314, 2022 WL 839672 (S.D. Ohio Mar. 22, 2022) (injunction stayed by Sixth Circuit).

Moreover, this Court's impending vacatur of the September Guidance will interfere with the orderly review of this policy across the judiciary, resolving—on a nationwide basis—the important legal issues involved even though other Courts are opining on those same issues. This Court issued its opinion the same day that the Sixth Court heard oral argument on the merits of an appeal of a nationwide preliminary injunction of the policy by another lower court—which the Sixth Circuit stayed—and the Sixth Circuit has publicly suggested it would "strive to" issue a decision by early July. *Arizona*, 31 F.4th at 483. Absent a stay, the September Guidance will be vacated even if the Sixth Circuit finds that the guidance constitutes a proper exercise of DHS's discretion. As a matter of judicial restraint, this Court should stay its final judgment and allow both the Sixth Circuit and the Fifth Circuit to give due consideration to the legal issues involved before DHS personnel must cease operating under guidance that was issued more than eight months ago and took effect more than six months ago.

At minimum, an extension of the administrative stay is warranted to ensure that the Fifth Circuit can rule on any stay motion filed by Defendants before DHS must comply with the Court's vacatur order. Otherwise, DHS may be placed in a position where, if the Fifth Circuit grants an administrative stay *after* the Court's administrative stay expires, DHS suffers a whipsaw effect where it momentarily complies with the Court's vacatur order, only to revert to the September Guidance shortly thereafter. Considering the current Friday expiration of the administrative stay, Defendants request that the Court extend the administrative stay while it considers this stay motion,

including the evidence in the declaration of Daniel Bible, and for an additional seven days after ruling on this motion if the Court denies the stay motion. *See Arizona v. Biden*, No. 22-3272, Dkt. 22-2 (6th Cir. Apr. 8, 2022) (granting administrative stay while it considered appeal of preliminary injunction of September Guidance) (purpose of administrative stay is to "preserve the status quo and provide [the court] with the opportunity to give 'reasoned consideration'" to stay motion) (collecting cases).

This Court should also extend the administrative stay pending consideration of today's Supreme Court's decision in *Garland v. Aleman Gonzalez*, No. 20-322, and the forthcoming *MPP* decision in *Biden* v. *Texas*, No. 21-954, which is expected within weeks. In *Aleman Gonzalez*, the Supreme Court held that 8 U.S.C. § 1252(f)(1), which restricts the "authority to enjoin or restrain the operation of" §§ 1221–1232, "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Aleman Gonzalez*, No. 20-322, 596 U.S. --, slip op. at 5 (2022). In so doing, the Court squarely held that § 1252(f)(1) applies where, as here, plaintiffs allege that "the Government [i]s misinterpreting and misapplying a covered statutory provision." *Id.* at 9.

Aleman Gonzalez involved an injunction rather than vacatur under the APA, but the Court's reasoning about § 1252(f)(1) applies equally to vacatur. Because vacatur prohibits an agency from giving effect to the vacated rule, a court "enjoin[s] or restrain[s] the operation of" the covered statutory provisions when it vacates a rule implementing those provisions. 8 U.S.C. § 1252(f)(1); *see Aleman Gonzalez*, slip op. at 4. And any argument that § 1252(f)(1) is limited to injunctions alone is inconsistent with Congress's use of the disjunctive "enjoin *or* restrain." *See id.* (discussing the meaning of "restrain").

The INA and the APA both make clear that the APA's remedial authorities give way to the specific remedial limitations in § 1252(f)(1). The INA makes those limitations applicable "[r]egardless of the nature of the action or claim or of the identity of the [plaintiff]," and it expressly withdraws "jurisdiction" to enter the prohibited remedies. 8 U.S.C. § 1252(f)(1). The APA is not

"an independent grant of subject-matter jurisdiction." *Califano v. Sanders*, 430 U.S. 99, 105 (1977). And the APA itself reinforces remedial limitations like those in § 1252(f)(1) by expressly providing that "[n]othing" in the APA right of review "affects other limitations on judicial review" or the "duty of the court to . . . deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702(1).

The § 1252(f)(1) provision—including the application of § 1252(f)(1) to APA vacatur—was also briefed in the *MPP* case in response to the Supreme Court's request for supplemental briefing on those issues. *See Biden v. Texas*, No. 21-954, 2022 WL 1299971 (May 2, 2022); *see also Biden v. Texas*, No. 21-954, Gov't Supp. Br. at 18-19 (May 9, 2022); *Biden v. Texas*, No. 21-954, Gov't Supp. Reply Br. at 6-7 (May 13, 2022). Moreover, this Court relied extensively on the Fifth Circuit's *MPP* decision, and the Supreme Court briefing in that case discussed issues that are relevant to the Court's reasoning here, including the applicability of *Castle Rock* to provisions of the INA and the permissibility of nationwide vacatur. It would therefore be appropriate for this Court to grant an interim stay to allow consideration of today's Supreme Court decision in *Aleman Gonzalez* and the Supreme Court's imminent decision in *MPP* before DHS is required to cease following the guidance that went in effect in November (and allowed by the Sixth Circuit to remain in effect).

ARGUMENT

Courts typically consider four factors in evaluating a request for a stay pending appeal: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant will be irreparably harmed if the stay is not granted; (3) whether issuance of a stay will substantially harm the other parties; and (4) whether the granting of the stay serves the public interest. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). When the Government is a party, its interests and the public interest overlap in the balancing of harms. *See Nken v. Holder*, 556 U.S. 418, 420 (2009).

First, the Government respectfully submits that it is likely to prevail on the merits of its appeal, because, *inter alia*, the Court's judgment undermines the Executive Branch's constitutional

and statutory authority to enforce the immigration laws and express Congressional delegation of authority to the Secretary to prioritize such enforcement nationwide. *See generally* Defs.' Mem. of P.&A. in Opp'n to Pls.' Mot. to Postpone the Effective Date of Agency Action or, in the Alternative, for Prelim. Inj. (ECF No. 122); Defs.' Post-Trial Findings of Fact and Conclusions of Law (ECF No. 222); Defs.' Post-Trial Mem. (ECF No. 223); Defs.' Resp. to Pls.' Post-Trial Br. (ECF No. 230); *see also Arizona*, 31 F.4th at 469 (staying injunction of September Guidance because the federal government was likely to prevail on the merits of its appeal on several alternative grounds).

Next, the balance of harms and irreparable injury that the Government faces from the Court's judgment strongly weigh in favor of a stay. Notwithstanding that the Court found that Plaintiffs have standing, any injury to Texas would pale in comparison to the significant harms to Defendants. The Court's decision will require DHS to abruptly inform its personnel that they are to cease relying upon guidance took effect more than six months ago, likely causing confusion over how to allocate DHS's limited enforcement resources and interfering with DHS's ability to execute the nation's immigration laws. *See generally* Bible Decl. (discussing harms to DHS, including its inability to prioritize finite resources in a manner that promotes public safety, national security, and border security).

In contrast, Texas identified only three detainers lifted on noncitizens in Texas Department of Criminal Justice (TDCJ) custody during the last six-week period for which data was available before trial, Pls.' Trial Ex. C, and one of those three detainers was reinstated, Defs.' Trial Ex. 5. *See also* Pls. Trial. Ex. C (identifying only 15 cancelled detainers from November 29, 2021, when the policy went into effect, to February 15, 2022). In the meantime, Plaintiffs' own witness acknowledged that the number of detainers ICE picked up from TDCJ from November 29, 2021, through February 15, 2022, potentially exceeded two hundred, 2/23 PM Trial Tr. at 51:13-52:3, Testimony of Robert Moore; *id*. at 52:17-53:4 (calling three dropped detainers in a month and a half a "small number:"). Louisiana did not even attempt to identify a single dropped detainer post-

dating the September Guidance notwithstanding ample opportunity to do so. Given these contrasting harms, a stay is more than warranted.

Finally, the public interest weighs in favor of the orderly execution of the nation's immigration laws. *See Arizona*, 31 F.4th at 482 ("the public interest favors a stay"). This administration has done nothing more than establish a prioritization scheme, as had the administrations that came before it. As this Court itself recognized there are practical limitations in effectuating a policy that accepts this Court's legal reasoning. *See* Slip Op. at 68. And yet, although this Court declined to issue an affirmative injunction, the Court underscored that any policy that DHS adopts in the future must subscribe to *this* Court's legal reasoning, notwithstanding the majority view of other reviewing courts and nature of ongoing judicial review. *See id*. at 89 ("Each of this Court's opinions placed the Government on notice about the problems with its decisionmaking."); *but see Texas*, 14 F.4th at 338-39, *vacated*, 24 F.4th 407 (stay of this Court's previous injunction of the interim enforcement guidance still in effect when the September Guidance was adopted); *Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law*, AR_DHSP_00000001 (engaging with the Court's previous analysis in the course of the Considerations Memo); *see also Arizona v. Biden* 31 F.4th at 469 (staying preliminary injunction of September Guidance); *Florida*, 2021 WL 1985058 (denying preliminary injunction of interim enforcement guidance); *Arizona*, 2021 WL 2787930 (D. Ariz. June 30, 2021) (same).

This Court should stay the effect of its judgment outside of Texas and Louisiana at the very least. Respect for sister courts currently reviewing the September Guidance and equitable principles counsel in favor of such a stay. *Cf. U.S. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J. concurring) ("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.").

CONCLUSION

For these reasons, Defendants respectfully request that the Court grant a stay pending appeal or, alternatively, extend the administrative stay for at least seven days after its decision on this motion.

Dated: June 13, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Branch Director

/s/ Adam D. Kirschner
ADAM D. KIRSCHNER
Attorney-in-charge
IL Bar. No. 6286601
Senior Trial Counsel
BRIAN C. ROSEN-SHAUD
ME Bar No. 006018
MICHAEL F. KNAPP
CA Bar No. 314104
KUNTAL CHOLERA
DC Bar No. 1031523
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 353-9265
Fax: (202) 616-8460
Email: Adam.Kirschner@usdoj.gov
Brian.C.Rosen-Shaud@usdoj.gov
Michael.F.Knapp@usdoj.gov
Kuntal.Cholera@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, D.C. 20044

Courier Address
1100 L Street NW, Room 11020
Washington, D.C. 20005

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
202-307-4293 (telephone)
Email: Erez.R.Reuveni@usdoj.gov

Counsel for Defendants

DANIEL DAVID HU
Assistant United States Attorney
Chief, Civil Division
State Bar No. 10131415
S.D. I.D. 7959
Southern District of Texas
1000 Louisiana, Suite 2300 Houston, TX 77002
Tel: (713) 567-9000
Fax: (713) 718-3300
Daniel.Hu@usdoj.gov

Local Counsel

CERTIFICATE OF COMPLIANCE

I certify that the total number of words in this motion, exclusive of the matters designated for omission, is 2136, as counted by Microsoft Word.

/s/ Adam D. Kirschner
ADAM D. KIRSCHNER

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 13, 2022.

/s/ Adam D. Kirschner
ADAM D. KIRSCHNER

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 Deputy Executive Associate Director. I have held this position since February 14, 2022, in an acting capacity, and formally accepted the position on May 8, 2022. As 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 to 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 (ATD) 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 apprehensions program; the 287(g) program; the Field Office's command center; the office currently titled the ERO criminal prosecutions unit; 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 ERO 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 April of this calendar year alone, U.S. Customs and Border Protection (CBP) apprehended a total of more than 233,000 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 June 12, 2022). Even with more than 96,000 of those individuals expelled pursuant to the U.S. Centers for Disease Control and Prevention's (CDC) Title 42 authorities, over 137,000 were processed under Title 8 of the U.S. Code. Nearly 111,000 Title 8 cases were apprehended in March; 73,000 in February; 75,000 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 June 4, 2022, nearly 84% of the 226,458 noncitizens booked into ICE custody since October 1, 2021, were apprehended by CBP. By comparison, approximately 65% of the 2,316,845 noncitizens booked into ICE custody between FY14-FY19 were apprehended by CBP.

[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.

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 pursuant to the CDC's Title 42 authorities and some of those processed for expedited removal, most noncitizens processed for immigration proceedings under Title 8 authorities, including most processed for expedited removal, are held in ICE custody. Additionally, some of those processed for expulsion pursuant to Title 42 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).

14. Upon issuance of the Mayorkas Memorandum, ERO conducted extensive targeted and continuous training for personnel on the implementation of the guidance, equipping the workforce with the foundational knowledge to implement the Mayorkas Memorandum and apply a thorough analysis of each case based on the totality of the facts and circumstances, to include a holistic assessment of both the aggravating and mitigating factors present in each case. ICE delivered training through the Performance and Learning Management System (PALMS), ERO Supervisory Training, Review of Effective Analysis and Decision (READ) Sessions, and leadership town halls. Foundational and supervisory training took more than four months to develop and deliver to ICE staff resulting in the training of more than thirteen thousand officers, agents, and support personnel. To date, ERO has held more than five thousand READ sessions, real-time continuous learning driven through scenario-based discussions. Over 90 hand-selected Field Trainers lead the training delivery of this effort. ERO implemented multiple feedback surveys at various iterations which allows field staff to ask questions and share feedback on the various trainings and process improvements in place. Contract support alone was approximately $5 million.

15. ERO also established a process by which a supervisory official reviews discretionary decisions in order to ensure continuity, completeness, and accuracy in the application of

departmental priorities. This process is accomplished through reporting by the local field offices in the Activity Analysis Reporting Tool (AART). Officers and agents are required to submit public safety cases through AART for supervisory review and include the selection of aggravating and mitigating factors that were considered by the official in deciding to take an enforcement action. The supervisory official reviews and confirm submissions within the public safety enforcement priority for completeness and accuracy. This kind of supervisory review is not new. ICE has utilized a review process since February 22, 2021, before the Mayorkas Memorandum was issued.

IV. Irreparable Harm from Vacatur

16. As a result of the court's vacatur of the enforcement guidance, DHS must either operate without guidance that affords any prioritization, or issue new guidance that reflects the district court's interpretations of 8 U.S.C. §§ 1226(c) and 1231(a)(2), even though DHS lacks the capacity to detain all noncitizens subject to mandatory detention under those statutes, and even if others pose a greater public safety threat. This will divert resources for public safety, national security, and border security missions, in ways that will make the nation less safe. It will create inconsistency among the workforce. And it is simply not feasible to implement what the court has suggested.

Impossibility of Complying with the Mandatory Detention Provisions in the Manner the Court Suggests

Detainers

17. 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 following notification by the LEA.

18. ERO has identified nearly 500 institutions that do not honor detainers, impacting almost all of ERO's 25 field offices. ERO has identified nearly 140 institutions that accept detainers only 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 mandatory custody provisions of § 1226(c) were interpreted as applying prior to ICE taking custody, in those instances in which the agency does not receive 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.

19. 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.

1226(c)

20. 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. ERO's operations would be severely impacted if, applying the court's interpretation of § 1226(c), ICE were to make determinations of whether noncitizens in federal, State, or local criminal custody are subject to § 1226(c) mandatory detention—even before the noncitizens are booked into ICE custody thereby triggering applicability of that statute.

21. 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, whether any conditions of release 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.

22. As an initial matter, DHS is not, and has never been, aware of all noncitizens in the United States 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 experience 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. 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, in most cases, 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 indicate whether § 1226(c) applies.

23. Further, ERO may not be aware of a noncitizen's criminality at the time a Notice to Appear (NTA) is issued by another DHS 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.

24. In addition, it is my experience that while individuals subject to 8 U.S.C. § 1226(c) are not eligible for release on bond, they are eligible for what 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); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). If ICE were

required to arrest every noncitizen who *may* be subject to § 1226(c) detention, without any prioritization based on public safety of national security threat, this would have cascading impacts not only on ERO, but also on ICE's Office of the Principal Legal Advisor (OPLA), whose attorneys 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. Such resources are limited. An increased workload in this area could negatively effect and slow down other priority immigration proceedings, hindering DHS efforts to secure final orders of removal, including those related to individuals who present egregious national security or public safety risks. It would also sharply curtail any progress being made to reduce the backlog in the immigration court system.

25. If ICE were to arrest all noncitizens who have removal proceedings pending and who could possibly be subject to restrictions on release from custody upon arrest would be extraordinarily burdensome—and likely impossible—for ERO to achieve compliance. As of June 5, 2022, there were nearly 327,000 noncitizens in pending removal proceedings on ERO's non-detained docket with either criminal convictions or pending criminal charges.

26. If, applying the court's interpretation of § 1226(c), DHS were to make 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.

27. 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.

28. In my experience, which has spanned 24 years and five presidential administrations, the agency has never, to my knowledge, enforced § 1226(c) as mandating the arrest of any individuals. To the contrary, I have always understood it to prohibit the release of those who have been arrested and taken into ICE custody.

Section 1231

29. As of June 5, 2022, there were 5,013 noncitizens with final orders of removal in ICE custody. Nearly 1.2 million noncitizens with final orders of removal remain non-detained. 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.

30. DHS has historically understood § 1231(a)(2) as authorizing the detention of noncitizens during the removal period, and prohibiting the release during the removal period only of those noncitizens who are already detained and have been found inadmissible under § 1182(a)(2) or (a)(3)(B) or deportable under § 1227(a)(2) or (a)(4)(B). Accordingly, ICE has long 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).

31. If ICE was required to 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," ICE would not have sufficient detention resources to implement the order while carrying out its broader mission priorities effectively.

32. ICE is appropriated for limited bed space and simply 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.

33. Additionally, implementation of such a requirement 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 uncooperative 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. In just one recent example, the situation in Ukraine significantly complicated potential removals of Ukrainian nationals. Absent special circumstances justifying continued detention, and as is constitutionally required, 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. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). When it is clear that this is going to be the case, ICE often releases such noncitizens during the removal period, so long as it not constrained by the "under no circumstance" limitation in the statute. If ICE were required 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.

34. If ICE had to maintain custody of every detained noncitizen during the removal period, that requirement would also bar the release of noncitizens who have been granted withholding of removal under § 1231(b)(3) or the Convention Against Torture (CAT) regulations. While a grant of withholding of removal only limits repatriation to certain countries, removal to third countries is rare. Yet, noncitizens granted withholding of

removal are subject to § 1231 detention. *See* 8 C.F.R. § 241.4(b)(3). There would be no operational reason to continue to detain noncitizens for 90 days who have established a clear probability of persecution on account of a protected ground or torture in the country of removal but who lack a significant likelihood of removal in the reasonably foreseeable future.

35. Enforcement actions against and continued detention of the entire population covered by §§ 1226(c) and 1231(a)(2) would require ICE bedspace, personnel, and other resources that simply do not exist. Prior to March 15, 2022, ICE was funding for 34,000 beds. That number included 2,500 family unit beds. The budget that went into effect March 15, 2022, does not include funding for 2,500 family unit beds. This reduced ICE's total available bed space from 34,000 to 31,500. The number of adult beds did not change. ICE's access to its full inventory of bedspace is limited, however, due to various court orders limiting the intake of noncitizen detainees, an increase in detention facility contract terminations, and detention facility contract modifications. The ongoing COVID-19 pandemic has also had a significant impact. It has led to cohorting and quarantine requirements for facilities, as well as social distancing within facilities, which often results in unusable beds.

Damaging Costs to National Security and Public Safety

36. Due to this finite number of detention beds, to meet the Department's important mission, ERO must prioritize its detention resources to facilitate the detention of certain noncitizens, including those who are convicted criminals, public safety threats, and/or recent border entrants. As of June 5, 2022, the currently detained population of 24,700 noncitizens constitutes more than 92% of the approximately 26,800 currently available

beds. If, applying the court's interpretation of §§ 1226(c) and § 1231(a)(2), ICE had to conduct enforcement actions against all noncitizens potentially subject to § 1226(c) or § 1231(a)(2), it would be impossible for ICE to prioritize the use of its finite detention resources to carry out its public safety, national security, and border security mission in a fair, consistent, and effective manner. Specifically, following the court's interpretation of those statutes could result in the release from federal, state, and local criminal custody of noncitizens ICE would otherwise deem priorities for removal, given their public safety, national security or border security threat.

37. Enforcement actions against the entire population described in the Court's order—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.

38. If, in an enforcement scheme that takes the court's reasoning into account, ICE had to pursue enforcement 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 require expenditure of DHS's limited detention space on—noncitizens 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. Likewise, noncitizens who are recently and credibly accused of serious crimes like murder, but who are not convicted, may pose a more serious public safety threat than noncitizens who may have been convicted decades ago for a non-violent tax offense even though the mandatory custody provisions would apply in the case of the tax offense and not the accused murder.

39. As a result, by vacating the Department's central guidance for ICE immigration officers 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 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, making the community *less safe*. Specifically, an enforcement scheme that applies the court's reasoning 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. Once a noncitizen described in § 1226(c) is taken into custody, officers expressly lack discretion

to release that person while proceedings are pending, even if that person does not pose a threat to national security, public safety, or border security. Without clearly established guidelines optimizing agency resources, the already limited bedspace could become encumbered by lower-priority individuals, impeding ICE's ability to target high-priority individuals for enforcement. Although local needs and demands are pertinent considerations, they must all work together in an efficient manner. In order for the nation's immigration enforcement apparatus to operate in a holistic manner that optimizes agency resources while carrying out ICE's congressional mandate to enforce the nation's immigration laws, there needs to be some form of central coordination.

40. If ICE were required 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.

41. 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 2,475 ERO personnel deployed during Fiscal Years 2021 and 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 ATD; 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. It also has freed up bed space needed to support certain Title 42 expulsions and expedited removal. If the Memorandum were vacated and the court's order were to go into effect, ICE's ability to support these key enforcement priorities would be significantly constrained.

42. While the agency continues to direct resources to the border, it is all the more 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. A shift in resources to detain those subject to §§ 1226(c)(1) or 1231(a)(2) also limits resources available to detain recent border-crossers, who, for lack of detention resources, will likely be released.

43. Taking away the ability of ICE immigration officers to consult the prioritization guidance 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.

44. The Mayorkas Memorandum appropriately focuses agency resources on enforcement actions against the most serious offenders in ways that better protect public safety and national security. As DHS collectively addressed the surge of migrants seeking to cross the Southwest Border, ICE shifted resources to the border consistent with the Mayorkas Memorandum, which prioritizes border security. As noted above, the number of CBP apprehensions along the border continues to increase, with processing under both Title 42 and Title 8 continuing at historic levels. ICE has been providing meaningful support in this effort. Among other things, ICE has taken on the role of completing processing of more than 300,000 cases involving noncitizens apprehended by CBP. ICE also

transports individuals from the border to ICE detention centers throughout the country, conducts removal and expulsion flights, enrolls others in ATD, liaises with local government officials, collects DNA of noncitizens, and updates ERO software with risk classification assessments including mitigating and aggravating factors, among other duties. Due to this shift in resources, ICE has had fewer resources available to devote to interior enforcement. With respect to interior enforcement actions, the Mayorkas Memorandum has enabled ICE to appropriately prioritize its limited resources to ensure that the actions ICE has taken are focused on the most serious public safety threats. Despite having to transfer resources to the Southwest Border, ICE has been able to use the Mayorkas Memorandum to ensure that important public safety goals were being met. In the first 180 Days of implementation of the Mayorkas Memorandum, ERO's percentage of enforcement actions involving noncitizens convicted or pending conviction of a felony (including aggravated felonies), Sex Offenses (Including Involving Assault or Commercialized Sex), and National Security Offenses was 14.9% higher than the same time frame in Fiscal Year 2020. Also in that period, the percentage of enforcement actions involving non-citizens convicted or pending conviction of Assault, Dangerous Drugs, Homicide, Robbery, Sex Offenses, Sexual Assault, and Weapon Offenses was 17.1% higher than the same time frame in Fiscal Year 2020.

Curtailment of Statutorily Authorized Discretion

45. An enforcement scheme that follows the court's reasoning also would undermine, if not effectively eliminate, the Secretary's statutory responsibility to "[e]stablish[] national immigration enforcement … priorities" consistent with 6 U.S.C. § 202(5) in a manner that the Secretary deems the best use of the agency's resources to support its missions.

The former INS, one of DHS's predecessor agencies, exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909, and continuing in every Administration, including after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, to maximize use of scarce agency resources, to protect the United States from national security threats, and to protect our citizens and communities from harm. *See Department of Justice Circular Letter Number 107*, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also, e.g.*, Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

Inconsistent Application

46. Implementation of an enforcement scheme consistent with the district court's order will likely result in inconsistent application among the ERO workforce, which, as discussed above, has been extensively trained to apply the Mayorkas Memorandum. Without such a rubric, the workforce would be left with no uniform guidance regarding certain enforcement decisions. This will likely lead to lack of consistency across enforcement actions, and is a vast deviation from ICE's prior exercise of discretion.

47. Notably, the Mayorkas Memorandum does not mandate any outcomes. Rather, it is framed in a way to empower officers to focus resources on individuals who present the most, actual threats. As implemented by ERO, the guidance promotes thoughtful deliberation by officers who have been trained to consider individual facts and circumstances prior to taking an enforcement action. Without a framework in place, there would still remain a large divergence between the number of noncitizens subject to detention under §§ 1226(c)(1) or 1231(a)(2) and available bedspace. The Mayorkas

Memorandum provides a mechanism for prioritizing amongst limited detention resources—focusing on the most significant public safety, national security, and border security threats. Without the Mayorkas Memorandum, officers will be left without a rubric to guide their decisions. One likely outcome is a first-come, first-served approach in which officers pursue enforcement action against anyone who falls within §§ 1226(c)(1) or 1231(a)(2), until bed space is full. The absence of a rubric could also result in a situation in which officers across the country are pursuing enforcement actions differently. Either of these situations risks significantly undermining public security and national security, as well as efforts to secure the border, by filling up bed space with noncitizens whose detention doesn't meet these goals, resulting in inefficient utilization of limited resources without adequately protecting public safety.

48. Reliance on the Mayorkas Memorandum provides consistency in enforcement. In its absence, there is likely to be inconsistency in how those entrusted with making determinations regarding enforcement of a noncitizen's final order of removal, resulting in possible inequitable outcomes. Notably, § 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. Notably, 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. Thus, for those individuals that fall within § 1231(a) but for which removal

has been determined is not "practicable or proper," ICE has historically not detained them during the removal period. The Court's interpretation of § 1231(a) seems to suggest that this approach may no longer be valid. If that were the case, ICE would be required to devote bedspace for 90 days to individuals it has no intention of removing, needlessly devoting resources to individuals that do not pose a threat and that ICE knows will be re-released to the community in a matter of months. This will inject considerable inconsistency and waste into the stay adjudication process.

49. Any potential policy or operational confusion due to vacatur could additionally harm ICE's relationship with state and local stakeholders. In particular, ICE must cultivate relationships with numerous state and local partners. To interact with state, tribal, and local jurisdictions, the Department needs to be able to articulate and defend its priorities. Operating without an overarching plan could irreparably harm ICE's relationships with key partners.

Ripple Effects and Resource Limitations

50. The vacatur of the Mayorkas Memorandum would have ripple and costly effects beyond ERO. For instance, OPLA, which represents ERO and all other DHS components in removal proceedings before the immigration courts, is facing crippling resource constraints that make prioritization essential. The number of cases pending before the immigration courts has more than doubled just since the end of Fiscal Year 2018, and the number of immigration judges has increased by more than 50 percent during that time. OPLA resource levels have not kept pace with this growth in docket size and the immigration bench, resulting in a deficit of several hundred OPLA attorney positions needed to litigate the administrative proceedings of noncitizens subject to removal under

the many grounds of removability established by Congress in the Immigration and Nationality Act (INA), including those who are subject to § 1226(c). *See* DHS, U.S. Immigration and Customs Enforcement Budget Overview – Fiscal Year 2023 Congressional Justification, at ICE-O&S-36 (explaining DHS's request for 341 additional OPLA positions in FY 2023 budget).[2]

51. Outside the context of immigration court, ERO relies heavily upon OPLA for legal advice and prudential counsel in performing our mission (including whether noncitizens are removable from the United States and under what authority they may be arrested and detained), and I have observed how these resource constraints have limited OPLA's availability to provide such services to ERO officers.

52. One way that OPLA has endeavored to address these resource challenges has been by building consideration of the priorities set forth in the Mayorkas Memorandum into its litigation practice before the immigration courts and Board of Immigration Appeals. *See* Memorandum from Kerry E. Doyle, Principal Legal Advisor, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022).[3] Already, OPLA has been able to remove thousands of nonpriority cases from the dockets by exercising prosecutorial discretion informed by the Mayorkas Memorandum. OPLA has also invested its time in conducting town hall meetings with stakeholders nationwide and updating ICE's public-facing website with Frequently Asked Questions and a Quick Reference Card to explain

[2] Available at https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf; *see also* DHS, U.S. Immigration and Customs Enforcement Budget Overview – Fiscal Year 2022 Congressional Justification, at ICE-O&S-22 (elaborating on OPLA resource shortfall and requesting additional attorney positions in FY 2022), available at https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf.

[3] Available at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

how it applies the Mayorkas Memorandum in representing DHS before the immigration courts.

53. In addition to further straining OPLA resources, I believe that vacating the Mayorkas Memorandum could lead to a lack of clarity among the public, including noncitizens and their legal representatives, who will be unclear how to request or receive consideration for prosecutorial discretion from the Agency's attorneys.

V. Re-programming funds/Detention Capacity

54. As an initial matter, reprogramming or transferring funds would not address the significant obstacles to identifying additional appropriate detention space. Over the past month, ERO has been working to identify additional beds and I am familiar with the many challenges associated with this effort. Finding and contracting for additional detention beds is a complicated process that requires several months per facility. First, ICE must identify available facilities. Second, ICE must conduct multiple preoccupancy inspections to ensure the facility is suitable for civil immigration detainees. Third, ICE negotiates with the detention provider and awards the contract that must be funded.

55. This process is complicated by the fact that detention providers are facing challenges in hiring appropriate staff, especially medical staff, and once staff are identified, ICE needs several weeks to ensure that they have appropriate clearances.

56. Notably, some facilities have terminated their contracts with ICE over the past two years. Further, civil immigration detention requires a heightened standard of care, and Congress has regularly required DHS to monitor facilities and discontinue agreements under certain circumstances. Available facilities are also impacted by state laws

prohibiting ICE detention. Further, ICE detention space has been limited by ongoing litigation that constrains ICE from using some of its detention capacity.

57. Based on the funding and operational challenges, I believe that ICE cannot readily add sufficient bedspace to accommodate the orders of magnitude of additional noncitizens that would need to be detained in order to comply with the court's order and also support its other interior enforcement and border security missions.

58. ICE has used ATD to increase the flexibility with which it addresses these and other challenges. ATD is not a form of detention; rather it is a flight mitigation tool ICE applies as a condition of release for certain noncitizens. Although ATD can take many forms, the most typical is placing the noncitizen on a form of electronic monitoring, with regular check ins. ICE's use of this technology is to promote an efficient and cost-effective way to ensure compliance with conditions of release for non-dangerous individuals. First, it frees detention space for those who pose a danger to the community, whether or not they fall under 8 U.S.C. §§ 1226(c) and 1231(a)(2). Second, it eliminates the need to unnecessarily expend detention resources – transport, housing, COVID quarantine protocols – on unnecessarily detained non-violent individuals. Congressional appropriation for ATD for fiscal year 2021 was $440.1 million. This reflects the fact that enrollment in ATD continues to increase. As of June 9, 2022, the ATD program had more than 270,000 enrolled participants, more than five times the approximately 53,000 participants in 2015. Program savings for utilizing ATD is also significant. The program cost per participant is under $5.00 per day. By comparison, the average daily bed rate for detained individuals is approximately $142 per day.

59. As reflected in its proposed budget request for Fiscal Year 2023 (FY23), the Administration is seeking to focus ICE's priorities on the gravest threats to the community and border security. This is being accomplished by focusing detention on those who truly pose a danger to the community, as well as supporting the border mission, and by reallocating funds to focus on ATD and transportation. Although the funding sought by the administration for bed space has decreased, the funding request for ATD has increased.

60. ICE is also playing an increasing role in border security. Since early 2021, ICE has found that it can best relieve impacted CBP stations by (1) enrolling migrants released by CBP in ATD and (2) using air and ground transportation resources to move migrants from impacted CBP stations to other places where they can be processed. In contrast to any suggestions that such funds are fungible, any significant reprogramming or transferring of funds from these valuable programs would also damage other important DHS priorities and programs. This could include funds appropriated to support important programs like Fugitive Operations and the Transportation and Removal program could be jeopardized by reallocation of funds without regard to the department's overall mission. ICE's budget is very constrained. In a climate where it is politically difficult for Congress to increase the topline funding for ICE, any increase in ICE programs like ATD and Transportation have required requisite decreases in other ICE programs like detention.

61. I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration is based on my

personal knowledge, as well as the information provided to me by other employees of the Department of Homeland Security.

Signed on this 13th day of June, 2022.

DANIEL A BIBLE

Digitally signed by DANIEL A BIBLE
Date: 2022.06.13 14:09:23 -04'00'

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

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

[PROPOSED] ORDER

After due consideration, Defendants' motion to stay judgment (ECF No. 241) pending appeal is **GRANTED**.

It is SO ORDERED.

Signed this ___ day of June, 2022.

_____
Drew B. Tipton
United States District Judge