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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

State of Arizona; State of Montana; and Mark Brnovich, in his official capacity as Attorney General of Arizona,

Plaintiffs,

v.

United States Department of Homeland Security; United States of America; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; Troy Miller, in his official capacity as Acting Commissioner of United States Customs and Border Protection; Tae Johnson, in his official capacity as Acting Director of United States Immigration and Customs Enforcement; and Tracy Renaud, in her official capacity as Acting Director of U.S. Citizenship and Immigration Services,

Defendants.

No. 2:21-cv-00186-SRB

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

(Oral Argument Set for April 8, 2021 at 10:30 a.m.)

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INTRODUCTION

Plaintiffs' Motion for Preliminary Injunction can and should be resolved based on the flagrant procedural illegalities of the January 20 Memorandum—an issue that DHS has already lost in *Texas v. United States* and chose not to appeal. *See* Dkt. 12-1 at 66. The illegality of the Memorandum extends to the nearly identical Interim Guidance, which is necessarily built upon the Memorandum as its indispensable foundation.

The policy announced by the Acting DHS Secretary on January 20—but in truth "author[ed]" by an incoming White House staffer in an act of political ventriloquism—was to "pause" removals of all but a narrow subset of aliens with final removal orders (the "Removal Moratorium").[1] In its haste to announce a policy appealing to certain aspects of its political base on Inauguration Day, the Biden administration engaged in fundamental—and quite possibly unprecedented—violations of the APA and immigration laws. First, the Removal Moratorium is arbitrary and capricious because DHS failed to consider the harms and alternatives to its nearly blanket prohibition on removals of those with final removal orders. Indeed, there is no indication that DHS considered anything at all. Second, the Removal Moratorium squarely violates the APA's notice-and-comment requirements. Third, the Removal Moratorium establishes an official policy to violate 8 U.S.C. § 1231(a)(1)(A)'s unequivocal mandate to process final orders of removal within 90 days. Fourth, the Removal Moratorium violates the MOUs between DHS and Plaintiffs.

Defendants' response attempts to sidestep these patent violations under the pretense that this case is limited to the Memorandum—which has already been enjoined. DOJ goes so far as to refer this Court to a different twenty-five page brief filed in Florida if "the Court believes this action does implicate the February 18 Guidance[.]" Response at 3 n.2. But this case is not so limited, and Plaintiffs have been clear that "This action also challenges the 'Interim Guidance.'" Dkt. 12 ¶ 9.

[1] As noted in the Motion, "Removal Moratorium" herein refers both to that moratorium in the Memorandum and in the Subsequent Interim Guidance unless otherwise noted. *See* Dkt. 17 at 3 n.3; *see also infra* pp. 8, 12 (discussing Interim Guidance).

In any event, that apparently incorporated-by-reference response is heavily focused on 8 U.S.C. § 1226—*not* 8 U.S.C. § 1231, which is the provision actually at issue here. And putting that aside, the Florida brief in turn refers to yet another brief, which was filed in the *Texas* case for certain key issues—such as whether the removal pause violates § 1231. Response to Preliminary Injunction, *Florida v. United States*, No. 21-cv-541, Dkt. 23 at 20 (M.D. Fla. Mar. 23, 2021). All of this attempted incorporating other briefs by reference is procedurally improper, and this Court should reject Defendant's arguments as to the Interim Guidance on that basis alone. *D'Agnese v. Novartis Pharm. Corp.*, 952 F. Supp. 2d 880, 885 (D. Ariz. 2013) (disregarding cross-references, noting "this attempt to incorporate various documents by reference that include arguments related and unrelated to the current issues before the Court circumvents … rules governing page limits.").

Those referenced briefs make plain that the Interim Guidance's restatement of the Removal Moratorium in slightly modified form is nothing more than an unsuccessful attempt to paper over the defects in the Removal Moratorium in the original Memorandum, which was enjoined in *Texas* and not appealed. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-76 (2019) (rejecting pre-textual agency action). For the reasons set forth below, the Court should grant the Motion and should enjoin the Removal Moratorium in the Interim Guidance as well in the Memorandum.

ARGUMENT

I. Plaintiffs Have Shown a Likelihood of Success on the Merits

A. Defendants' Threshold APA Defenses Fail

Defendants raise the same threshold defenses they raised in *Texas v United States*. They fail here for the same reasons that they were rejected by that court.

1. This decision is not committed to agency discretion by law

Defendants cannot overcome the APA's "strong presumption in favor of judicial review[.]" *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Because Section 1231(a)(1)(A) contains an express command to execute the final step in the removal process within 90

days, Congress has removed agency discretion from this particular provision of the INA. *See Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985). Even if the statute were to vest the agency with *some* discretion, the Removal Moratorium amounts to an abdication of DHS's statutory duty and, thus, still runs afoul of the APA. *See id.* at 833 n.4.

Section 1231(a)(1)(A) is best understood as the culmination of Congress's statutory scheme for removal. It is categorically not the type of general investigative, prosecutorial, or police task committed to agency discretion under *Chaney* or *Castle Rock*. Although *other* INA provisions may contain enforcement flexibility, the unambiguous mandatory language of § 1231(a)(1)(A) does not. *See Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003) ("Ordinarily, the INS *must* remove an alien in its custody within ninety days from the issuance of a final removal order." (emphasis added)).

Congress enacted § 1231(a)—and its less-stringent predecessor § 1252(i)—to "reduc[e] prison overcrowding and cost to the government" and therefore impos[ed] a duty on the [government] to deport criminal aliens[.]" *Giddings v. Chandler*, 979 F.2d 1104, 1109-10 (5th Cir. 1992) (citing 8 U.S.C. § 1252(i) (1986)); *Prieto v. Gluch*, 913 F.2d 1159, 1165 (6th Cir. 1990) ("the burden of inaction [in removals] falls on the State and local governments and not on the Federal system.") (quotations omitted). For that reason, "Congress intended for inadmissible, excludable, or removable aliens to be deported within 90 days, if possible." *Ulysse v. Dep't of Homeland Sec.*, 291 F. Supp. 2d 1318, 1325 (M.D. Fla. 2003). Congress in § 1231(a)(1)(A) has left virtually no room for agency discretion when it comes to the agency's timely removal of aliens; Defendants may not skirt that statutory duty by rearranging enforcement priorities. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes[.]").

The statutory language and context § 1231(a) divest DHS of any possible discretion. *See Dunlop v. Bachowski*, 421 U.S. 560 (1975) (mandatory "shall" language required Secretary of Labor to investigate complaint filed by union worker); *Chaney*, 470

U.S. at 833 (distinguishing *Dunlop* statute from FDA's general decision to forego enforcement proceeding). A statutory event, such as the filing of a complaint or the entering of a final order of removal, combined with "shall" sets these situations apart more generalized enforcement decisions under *Chaney*. As discussed in section I.B.1., *infra*, the use of "shall" in the statutory context shows this command to be mandatory.

Moreover, even general enforcement commands, are not completely immune from judicial review under *Chaney* when a plaintiff challenges an agency's enforcement *policy* rather than an individual enforcement decision. *See Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994). This is because "an agency's pronouncement of a broad policy against enforcement poses special risks that it 'has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities[.]'" *Id.* at 677 (quoting *Chaney*, 470 U.S. at 833 n.4); *see also Abreu v. United States*, 796 F. Supp. 50, 54 (D.R.I. 1992) (INS "abrogates its statutory duty by delaying deportation hearings until the expiration of a prison term") (citing 8 U.S.C. § 1252(i) (1988)). DHS's wholesale exemption of nearly all final orders of removal is just such a policy.

Defendants cannot evade APA review by hiding behind generalized—and capacious—assertions of enforcement discretion. Congress has spoken and the Moratorium directly conflicts with the unambiguous directives in § 1231(a)(1)(A).

2. Congress has not precluded judicial review here

None of the INA provisions cited by Defendants preclude judicial review because they pertain only to *individuals'* claims challenging removal. Sections 1252(a)(5) and 1252(b)(9) are inapplicable because they merely limit how aliens can challenge their removal proceedings and channel judicial review to the courts of appeals. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016). Section 1231(h)'s text shows that Congress enacted it to bar *aliens* from filing lawsuits under § 1231, not to protect unlawful agency action from APA challenge. *See Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

The text of § 1252 makes clear that it applies to "[j]udicial review of orders of

removal." *See* 8 U.S.C. § 1252. This applies to individual filing petitions challenging orders of removal, not Plaintiff states. *See Martinez v. Napolitano,* 704 F.3d 620, 622 (9th Cir. 2012); 8 U.S.C. § 1252(d). The States are not challenging a judicial order of removal and therefore § 1252(a)(5) does not apply.

Section 1252(b)(9) is likewise inapplicable because it concerns individuals' challenges to final orders of removal. *See* 8 U.S.C. § 1252(b)(9) ("Judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 499 (1999) (Stevens, J., concurring) ("[T]he meaning of 8 U.S.C. §[] 1252(b)(9)" is "perfectly clear." The statute "postpones judicial review of removal proceedings until the entry of a final order ….").

Section 1231(h) also does not bar review. The term "any party," as used in § 1231(h), unambiguously refers to aliens involved in removal proceedings. As a result, "[s]ection 1231(h)'s bar is irrelevant" because the States do "not bring any claims under that section." *See Chhoeun v. Marin*, No. SACV 17-01898-CJC, 2018 U.S. Dist. LEXIS 132363, at *17 n.3 (C.D. Cal. Mar. 26, 2018). This conclusion is confirmed by the statutory and legislative history of § 1231.

Section 1231(a)(1)(A) has two prior corollary statutes, 8 U.S.C. § 1252(i)[2] and 8 U.S.C. § 1252(c).[3] *See Channer v. Hall*, 112 F.3d 214, 216 (5th Cir. 1997). In enacting these earlier versions, Congress was concerned with prison overcrowding because "the burden of inaction [on removals] falls on the State and local governments[.]" *See Prieto*, 913 F.2d at 1165 (citing 132 Cong. Rec. H9794 (daily ed. Oct. 9, 1986) (statement of Rep. MacKay)).[4]

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[2] "In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceedings *as expeditiously as possible* after the date of conviction." 8 U.S.C. 1252(i) (1986).

[3] "[T]he Attorney General shall have a period of six months from the date of [a final order of deportation under administrative processes] . . . to effect the alien's departure." 8 U.S.C. 1252(c) (1994).

[4] *Accord Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Giddings*, 979 F.2d at 1109; *Hernandez-Avalos v. INS*, 50 F.3d 842, 847 (10th Cir. 1995); *Gonzalez v. United States*

The Ninth Circuit subsequently ruled that § 1252(i) also created a duty to incarcerated aliens, putting them within the zone of interest for mandamus actions. *See Campos*, 62 F.3d at 312. Congress disapproved of this interpretation and enacted § 225 of the Immigration and Nationality Technical Corrections Act of 1994 ("INTCA") to address the problem. Pub. L. No. 103–416, 108 Stat. 4305 ("nothing in … 8 U.S.C. § 1252(i)[] shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person"). The Ninth Circuit acknowledged that § 225 was likely in direct response to its prior holding. *See Campos,* 62 F.3d at 314. It also noted that "[b]y enacting section 225, Congress made clear that the sole purposes of section 1252(i) are economic, not humanitarian." *Id.* The term "party" only applies to aliens involved in removal proceedings and does not bar Plaintiffs' APA claims.[5]

3. The States are not barred by the "zone of interests" test

The zone of interest test is not especially demanding, and the States need only be "'arguably'" within what is protected or regulated by the statute. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). The States easily satisfy this "lenient" standard for an APA claim. *Sierra Club v. Trump*, 929 F.3d 670, 703 n.26 (9th Cir. 2019).

The interests the States seek to protect fall directly within the zone of interests of the INA. *See Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (quoting *Arizona v. United States*, 567 U.S. 387, 397 (2012) ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States," which "bear[] many of the consequences of unlawful immigration."). This "[r]eflect[s] a concern that 'aliens have been applying for and receiving public benefits from Federal, State, and local

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INS, 867 F.2d 1108, 1110 (8th Cir.1989) (§ 1252(i)).

[5] In 1996, Congress transferred §§ 1252(i) and (c) to a new section, § 1231, with the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No 104-208, 110 Stat. 3009 (1996). *See Channer*, 112 F.3d at 215–16 (discussing transfer). The language of § 1231(h) is nearly identical to § 1252(i).[5] Thus, § 1231(h) was meant to correct the Ninth Circuit's ruling and nothing else. The statutory text, context, and legislative history eliminate any doubt regarding Congress's intent in enacting § 1231(h).

governments at increasing rates[.]'" *Id.* (quoting 8 U.S.C. § 1601). "'Congress deemed some *unlawfully present* aliens ineligible for certain and local public benefits unless the state explicitly provides otherwise.' With limited exceptions, unlawfully present aliens are 'not eligible for any State or local public benefit.'" *Id.* (quoting 8 U.S.C. § 1621(a)).[6]

Defendants mistakenly rely on dicta from the Tenth Circuit's decision in *Hernandez-Avalos.* Dkt. 26 at 13-14. *Hernandez-Avalos*, importantly, did not involve an APA claim. 50 F.3d at 845 n.8. And the claim made by four aliens serving prison sentences seeking a writ of mandamus to initiate deportation proceedings. *Id.* at 843. *Hernandez-Avalos* was also decided prior to the Supreme Court's decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), which loosened the zone of interest test. *See id*. at 283. The dicta in *Hernandez-Avalos* cannot overcome the definitive statutory history and plethora of caselaw showing that § 1231(h) applies only to aliens.

4. The Removal Moratorium Is Final Agency Action

The Removal Moratorium constitutes final agency action. DHS chose to institute a binding 100-day Moratorium for a statute containing a 90-day window for removal that directly affects rights and obligations and has immediate legal consequences. Defendants attempt to characterize this abdication of statutory duty as "a temporary shift in priorities" which "defer[s] enforcement for a brief period;" but the action deserving scrutiny is the pause itself, which took effect immediately and constituted the consummation of the agency's (*i.e.*, the White House's) decision-making process, such as it were. Dkt. 26 at 14. The possibility that DHS may supersede the Moratorium with another final agency action down the line does not insulate it from review. *See Sackett v. EPA*, 566 U.S. 120, 127 (2012).

The Removal Moratorium suspends DHS's statutory obligation to remove aliens within 90 days. *See Lema*, 341 F.3d at 855. It demands that DHS officials defy

[6] Although not required, Plaintiffs also satisfy the zone of interest test when applied specifically to § 1231. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987). As discussed in Part I(A)(2), *supra*, § 1231(a)(1)(A) and its prior corollary statutes, 8 U.S.C. § 1252(i) and 8 U.S.C. § 1252(c), were intended to remove burdens on the State and local governments. *See, e.g., Campos*, 62 F.3d at 314; *Prieto*, 913 F.2d at 1165; *Giddings*, 979 F.2d at 1109.

§ 1231(a)(1)(A). *See NRDC v. EPA*, 643 F.3d 311, 320 (9th Cir. 2011). Section B of the Memorandum tellingly stated "nothing [herein] prohibits the *apprehension* or *detention* of individuals unlawfully in the United States who are not identified as priorities" but specifically did not mention *removals*. Dkt. 12-1, Ex. A at 3 (emphasis added).

The Interim Guidance later expanded that pronouncement to "the arrest, detention, *or removal* of any noncitizen" and set forth a process whereby ICE may allegedly institute removal actions against non-priority persons. *Id*., Ex. G at 3, 6 (emphasis added). But this new scheme merely hides the same non-removal policy behind a slightly more creative veil of discretion.[7] Even if the Guidance confers some discretion, it reverses the statutory presumption in favor of removal and forces ICE to seek approval from high-level officials to carry out its most routine statutory functions. *See Lema*, 341 F.3d at 855.

There are also legal consequences flowing from these rights and obligations. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). DHS's abdication of its statutory duty has significant legal consequences for those with final orders of removal who are detained. *See Zadvydas*, 533 U.S. at 683-84; *id.* at 701 (discussing 8 U.S.C. § 1231(a)(6)). It also orders "assessments of alternatives to removal" for all previous final orders of removal. Dkt. 12-1, Ex. A at 4. As discussed in section II, *infra*, it also affects the obligations of the States. *See, e.g.*, *Campos*, 62 F.3d at 314; *Prieto*, 913 F.2d at 1165; 8 U.S.C. § 1231(i) (empowering the Attorney General to contract with States to offset the costs that States incur when detaining criminal aliens).

The Removal Moratorium affects rights and obligations for multiple parties. The legal consequences are such that it clearly constitutes final agency action regardless of post hoc efforts by DHS to appear otherwise.

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[7] *See* Molly O'Toole, *Biden directs ICE to focus arrests and removals on security threats*, L.A. TIMES (Feb. 18, 2021) ("John Sandweg, acting ICE director and general counsel at the Homeland Security Department under President Obama, said … 'ICE follows its policies to a T … I don't share the groups' concerns that somehow they will … result in individuals who don't pose public safety being apprehended or deported.'").

B. Defendants' Merits Defenses Also Fail

Plaintiffs are likely to succeed on the merits of their claims because the Removal Moratorium is contrary to law under 8 U.S.C. § 1231(a)(1) and a violation of the APA and of the MOUs. While Plaintiffs are likely to succeed on their multiple claims, "a party seeking a preliminary injunction need only demonstrate a likelihood of success on one claim for which injunctive relief would otherwise be appropriate." *Piper v. Gooding & Co. Inc.*, 334 F. Supp. 3d 1009, 1021 n. 7 (D. Ariz. 2018).

1. The Memorandum and Interim Guidance are Contrary to Law under 8 U.S.C. § 1231(a)(1)

The Removal Moratorium is contrary to law under 8 U.S.C. § 1231(a)(1) and an improper assertion of agency discretion. The word "shall" in § 1231(a)(1)'s 90-day removal directive is mandatory language. *See Lema*, 341 F.3d at 855 ("Ordinarily, the INS *must* remove an alien in its custody within ninety days from the issuance of a final removal order. *See* 8 U.S.C. § 1231(a)(1)(A)-(B)."") (emphasis added). Defendants' contrary assertions (at Dkt. 26 at 15-16) rely almost exclusively upon *Castle Rock*. But that case involves interpretation of different statutory language (described as "vague" by the Supreme Court), a different basis for plaintiff's claims (Due Process Clause rights and § 1983), and different requested relief (monetary damages for a single incident of non-enforcement). *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 754, 763 (2005). And its holding was based on a different question of whether the plaintiff had a "protected property interest" in the benefit of police enforcement of the restraining order against her husband: "Even if the statute could be said to have made enforcement of restraining orders 'mandatory' … that would not necessarily mean that state law gave *respondent* an entitlement to *enforcement* of the mandate." *Id.* at 751, 764-65.

Unlike § 1231(a)(1), the language of the Colorado statute at issue in *Castle Rock* provides for discretion on its face, first stating a "peace officer shall use every reasonable means to enforce a restraining order" and "shall arrest, or, if an arrest would be impractical … seek a warrant for the arrest of a restrained person" when probable cause of a violation exists. *Id.* at 759 (quoting Colo. Rev. Stat. § 18-6-803.5(3) (Lexis 1999)).

As the Court noted, this imprecision and potential for choice leaves unclear "the precise means of enforcement that the Colorado restraining-order statute assertedly mandated. … Such indeterminacy is not the hallmark of a duty that is mandatory." *Id.* at 763. And one of the options, "seeking of an arrest warrant[,] would be an entitlement to nothing but procedure—which we have held inadequate even to support standing[.]" *Id.* at 764.

Contrast this with "Except as otherwise provided in this section … the Attorney General shall remove the alien from the United States within a period of 90 days[.]" 8 U.S.C. § 1231(a)(1)(A). Here, the means of enforcement are clear: removal within 90 days. Exceptions must be prescribed in the law. The language of § 1231(a)(3) regarding supervision after the 90-day period does not make the 90-day removal period any less mandatory, especially where § 1231(a)(1) acknowledges that Congress may provide for exceptions to the 90-day timeframe, such as where the alien fails to obtain travel documents or "conspires or acts to prevent the alien's removal" as outlined by § 1231(a)(1)(C).[8] Section 1231(a)(3)'s language merely shows that Congress recognized the need for regulations to cover those instances in which reality does not conform to the 90-day removal period, such as in those exceptions it expressly provided. But that is not license for DHS to disregard the statute's mandatory language as applied wholesale to entire classes of aliens with final orders of removal.

To the contrary, as the Ninth Circuit recognized in *Lima*, "shall" means "must" in § 1231(a)(1)(A), and it is proper for this Court to hold that the same language continues in its recognized, mandatory meaning. 341 F.3d at 855. DHS's authority is bound by the language of the U.S. Constitution and of relevant statutes enacted by Congress, and "does not include the authority to 'suspend' or 'dispense with' *Congress's* exercise of legislative Powers in enacting immigration laws." *Texas v. U.S.*, 2021 WL 723856, at *37 (S.D. Tex. Feb 23, 2021). Thus the 100-day Removal Moratorium is unlawful

[8] Indeed, the Ninth Circuit also held that the "shall" in § 1231(a)(3) means "must," which supports a reading of the word to conform to the same meaning throughout the same statutory text. *See*, *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1115 (9th Cir. 2001); *and Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning").

because it violates § 1231(a)(1)'s mandatory 90-day removal language on its face.

2. The Memorandum and Interim Guidance Failed to Consider Alternatives Under *State Farm* and *Regents*

The Removal Moratorium is also arbitrary and capricious because DHS failed to "supply a reasoned analysis for the change" and to consider policy alternatives. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 51 (1983); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("*Regents*") ("when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'") (quoting *State Farm*, 463 U.S. at 51). Indeed, as the Supreme Court reaffirmed this week, the "APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus*, No. 19-1231, slip op. at 7 (U.S. Apr. 1, 2021).

Defendants provide almost no reasoning or explanation for the Memorandum—a scant seven-page administrative record consisting of a broadly worded executive order and the Memorandum itself—and refused to provide *any* record or other evidence of analysis supporting the Interim Guidance. Admin. Record at AR_000001-7, *Texas v. United States*, No. 6:21-cv-00003 (S.D. Tex. Feb. 3, 2021), ECF No. 59-1; Dkt. 18 at 2-3; Dkt. 20. Defendants' position appears to be that all the evidence of the agency's "reasoned analysis" necessary to support either documents for the purposes of this Motion for Preliminary Injunction is contained in the text of the Memorandum itself. Dkt. 18 at 3 (claiming an administrative record for the Interim Guidance is not necessary because of its link to the Memorandum). Defendants offer nothing else to sustain it.

This is not remotely sufficient. "When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one." *Judulang v. Holder*, 565 U.S. 42, 45 (2011). But DHS's decision documents only announce *what* DHS is doing and make no attempt to explain *why*. In doing so, DHS failed to surmount the APA's not-high bar.

The absence of any genuine reasoning is particularly alarming in light of Defendants' admission that "DHS 'display[ed] awareness that it *is* changing position.'"

Dkt. 26 at 18 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Yet the Memorandum fails to provide any indication that the agency even considered the important costs of its new policy, despite such decision-making being "the agency's job[.]" *Regents*, 140 S.Ct. at 1914. DHS even fails to supply an explanation for the length of its 100-day pause in removals. Why not 50 or 180 days? DHS certainly never even hints why (though the metadata reveals it was because that it was length that the White House dictated to it). Defendants argue that it is somehow fatal to Plaintiffs' case that the States have not suggested their own policy alternatives, but (1) not only has *Regents* made clear that doing so is DHS's job—not Plaintiffs' and (2) Plaintiffs did actually name alternatives in their briefing by questioning why a 100-day pause was chosen over some other number, such as 50 or 200. Dkt. 26 at 18; Dkt. 17 at 5. DHS still failed to provide evidence of having weighed even these obvious alternatives.

The lack of evidence of any prior analysis or weighing of factors exposes the Removal Moratorium as resting on impermissible pretextual basis. To the extent that any actual analysis actually occurred here: (1) it was performed by the White House, not DHS, and (2) is entirely imperceptible—*i.e.*, completely absent from the administrative record produced to date and Defendants' own submissions to-date here.

Defendants note that the standard of review allows for proportionality regarding the evidence required on each side, and choosing a policy may involve "a complicated balancing" of factors within the agency's expertise. Dkt. 26 at 18. Maybe so. But there is no evidence that DHS did any such balancing. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

Unlike the cases Defendants cite, Plaintiffs do not ask the Court to judge the policy wisdom of DHS's preferred policy against Plaintiffs'. Plaintiffs simply ask this Court to take note of the near-complete absence of actual reasoning by DHS and weigh that against that the APA demands under *State Farm* and its progeny, under which DHS's analysis is palpably wanting. *See*, Dkt. 26 at 18.

The administrative record provides no support for the Memorandum. And Defendants' briefing admits that validity of the Removal Moratorium rests on the validity of the Memorandum alone. Dkt. 26 at 17 n 8 ("Defendants do not rely on the Guidance to defend the policy the States challenge."). Moreover, even if DHS were to attempt to provide more justification now, such rationale must be rejected as *post hoc* pretext since the evidence here shows that DHS irretrievably committed to the Moratorium at a time when it had done no analysis whatsoever to support that decision. *Dep't of Commerce*, 139 S.Ct. at 2573-76. It is thus arbitrary and capricious.

3. The Memorandum and Interim Guidance Failed to Comply with Notice and Comment

The Memorandum and Interim Guidance both failed to comply with the APA's notice and comment requirements. 5 U.S.C. § 553. Defendants acknowledge that the Removal Moratorium is a rule subject to the APA, but assert that it is exempt as either a "general statement of policy" or a "procedural rule." Dkt. 26 at 18-19. But "[a]gencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1812 (2019). "[C]ourts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Id.*

The Removal Moratorium is neither a general statement of policy nor a procedural rule. A general statement of policy must "not impose any rights and obligations" and may only "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); and *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012-13 (9th Cir. 1987). Similarly, "a procedural rule does not itself 'alter the rights or interests of parties.'" *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011) (quotations omitted). But the Removal Moratorium does just that: it is of immediate effect, "commands that DHS stop performing its obligation under section 1231(a)(1)(A)," and "affects the rights of those with final orders of removals by calling for a reassessment of *all* previous orders of removal[.]" Ex. A at 3; *Texas*, 2021 WL

723856, at *45. Indeed that is the very point of the Moratorium: confer on those with final removal orders a new right to avoid removal.[9]

More generally, a rule is not procedural if it "encodes a substantive value judgment" thereby "putting a stamp of [agency] approval or disapproval on a given type of behavior." *Chamber of Commerce of the U.S. v. U.S. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (cleaned up). The Moratorium plainly does that: it places DHS's "stamp of disapproval" on removals for 100 days in a manner no line officer could fail to perceive.

The Moratorium also affects the rights and obligations of states that suffer the costs of the Removal Moratorium, such as those leading to Plaintiffs' irreparable injury discussed in section II., *infra*. And the Removal Moratorium is not an exercise of a discretionary power, as discussed in sections I.A.1. and I.B.1., *supra*. Thus the rule cannot be a mere statement of policy or procedural rule.

4. The Memorandum and Interim Guidance failed to follow any part of the MOUs, even the commitment by DHS to consult and provide a written explanation for rejecting State's requests

DHS's failure to follow the MOUs supports these claims. But for one footnote, Defendants' Response is generally preoccupied with a mischaracterizing of Plaintiffs' claims regarding the MOUs. Dkt. 26 at 20 n 9 ("The States raise the agreements only in support of an APA claim"). Plaintiffs are not seeking specific performance of the MOUs. Dkt. 26 at 20-23. Rather, Plaintiffs seek a declaration that the Removal Moratorium is void, and *inter alia*, the MOUs establish that DHS changed its removal policy, did not follow proper procedure in doing so—including a failure to comply with either the APA or the MOUs' requirements to provide notice and an explanation of that change—and recognized that such a change would cause Defendants irreparable harm. Dkt. 12 at 15. DHS's non-compliance with the MOUs exposes its non-compliance with APA requirements. Even if DHS could not bind itself to later specific performance claims via the MOUs, these documents support Plaintiffs' APA claims, highlighting policy change and DHS's failure to follow statutory procedures in adopting it.

[9] The States' obligations are also affected. *See* section I.A.4., *supra*.

II. Plaintiffs Have Standing And Have Established Irreparable Injury Warranting a Preliminary Injunction Here

Defendants' position is that no State—not Arizona, Montana, Texas, or Florida—has standing to challenge DHS's sudden change in policy on carrying out the immigration laws and also that no State suffers irreparable injury from the predictable consequences of DHS's actions.[10] But this extreme position has already lost in this Court on similar issues. *See United States v. Arizona*, 2011 WL 13137062, at *1-2 (D. Ariz. Oct. 21, 2011) (finding Arizona had standing to bring counterclaims). And the United States has already lost in *Texas v. United States* on this very issue in the context of the Memorandum. *See* Dkt. 12-1 at 73-81, 104. The same result should obtain here.

As a preliminary matter, the Court can easily reject DHS's argument (at 5) that the *Texas* preliminary injunction eliminates standing for the simple reason that this case also challenges the Interim Guidance, which was not at issue in Texas.

DHS also admitted in its MOUs that "a decrease or pause on returns or removals of removable or inadmissible aliens" would "result in concrete injuries" to Plaintiffs. Dkt. 17 at 16. DHS further acknowledged that "an aggrieved party will be irreparably damaged and will not have an adequate remedy at law." *Id.* DHS responds by offering its merits argument about the validity of the MOUs. Dkt. 26 at 7. But "the question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute[.]" *Bond v. United States*, 564 U.S. 211, 219 (2011). Moreover, the harm alleged with respect to the MOU is a procedural harm—the harm from DHS's breach of its commitment to hear the States' concerns and provide a written explanation if it rejects those concerns. Such procedural harm is irreparable for purpose of injunctive relief. Dkt. 17 at 23 (collecting cases). And contrary to Defendants' argument (at 7), this procedural injury is sufficiently tied to the other concrete harms that the State discussed in its Motion and supported with affidavit evidence—the financial

[10] *See* Dkt. 26 at 4-7 (arguing that Arizona and Montana cannot establish standing or irreparable injury); *see also* Dkt. 12-1 at 73-81, 104 (reviewing and rejecting argument that Texas lacks standing and irreparable injury in *Texas v. United States*); Response to Preliminary Injunction, *Florida v. United States*, No. 21-cv-541, Dkt. 23 at 7 (M.D. Fla. Mar. 23, 2021) (arguing that Florida lacks standing and irreparable harm).

harms that Plaintiffs will suffer from a sudden and ill-conceived change in policy.

Indeed Plaintiffs identified three specific bases for standing and irreparable harm separate from the MOU: incarceration costs, other increased law enforcement costs such as traffic, and healthcare costs for unauthorized aliens. Dkt. 17 at 16-22. The State also demonstrated that many of these costs are unrecoverable, and thus irreparable. *Id.* Importantly, DHS never responded to the increase in unauthorized traffic leading to greater law enforcement expenditures (Motion at 18). *See also*, Ex. M at ¶ 20 and Ex. P at 10 (Aliens illegally crossing the southern border and remaining present in the United States facilitate drug trafficking, and the increased costs of enforcing drug laws and combating drug-related crime have taxed Montana's already limited resources.). DHS's failure to respond to this argument—which was supported by specific evidence—concedes irreparable injury. *See United States v. Duro*, 2009 WL 10669404, at *11 n.8 (C.D. Cal. Apr. 1, 2009) ("Based on the Government's failure to respond to the merits of this argument, the Court finds that it has waived the right to oppose the Court's ruling on this issue."); *Doe v. Dickenson*, 615 F. Supp. 2d 1002, 1010 (D. Ariz. 2009) (same). Defendants also never address special solicitude standing. Dkt. 17 at 15 n.9. This is because they have no response to this.

Defendants' only response to the other unrecoverable financial harms (incarceration and medical expenses) is to argue that these events are contingent on the actions of third parties. Dkt. 26 at 7. But the cases Plaintiffs cited in the Motion are on point and hold that when the actions of third parties are a predictable consequence of the defendant's actions, standing and irreparable injury are met. Most significantly in *California v. Azar*, the Ninth Circuit held that a causal chain did not fail simply because it has multiple "links"; and a state meets its burden by demonstrating an event is "reasonably probable[.]" 911 F.3d 558, 571-72 (9th Cir. 2018).[11] In the Motion, the State noted that in Texas the recidivism rate for unauthorized aliens was 70%. Further

[11] Defendant's attempts to distinguish this and other cases fail. *See, e.g.*, *Washington v. DeVos*, 466 F.Supp.3d 1151, 1169-70 (E.D. Wash. 2020); *Dep't of Commerce v. New York*, 139 S. Ct. at 2565.

data shows that in the Pinal County Jail, individuals with ICE Detainers have a recidivism rate of approximately 53%. Ex. Q (Lamb Supplemental Declaration.). Plaintiffs have thus shown a reasonable probability of suffering unrecoverable financial costs from the Removal Moratorium. The State's argument therefore is not that there is a "mere increase in population," Dkt. 26 at 6, but rather that DHS's new policy to limit removals even after final orders of removal have been issued will result in specific, unrecoverable costs to healthcare and law enforcement.[12] In sum, Plaintiffs have met their burden of showing standing and irreparable injury to support a preliminary injunction.

III. The Balance of the Equities and Public Interest Factors Support Plaintiffs

Respondents argue (at 23) that any injunction would "restrain[] core article II authority." But that contention is belied by their refusal to appeal the *Texas* injunction. Respondents are not acquiescing in an unconstitutional evisceration of their executive powers; they are simply abandoning defense of the indefensible.

Ultimately, the Moratorium is not an exercise of discretion by DHS. It is an outright prohibition imposed by White House political staffers eager to demonstrate progress on "day 1" and contemptuous of statutory mandates and APA procedural requirements. And the most relevant Constitutional concern here is not "core article II authority"—it is the executive's patent violation of Congress's exercise of its authority "[t]o establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl 4..

CONCLUSION

Plaintiffs respectfully request that the Court issue a preliminary injunction preventing Defendants from implementing the Removal Moratorium.

[12] The Response's factual premise (at 5-6) that because the moratorium excludes those arriving after 11/1/20, it does not encourage additional unauthorized immigration. That factual premise contravenes common sense and extensive news reports. Moreover, Defendants do not provide any citation to the administrative record to support this bare assertion. Instead this is mere attorney argument that cannot make up for the lack of any meaningful administrative record in this case.

RESPECTFULLY SUBMITTED this 2nd day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2021, I electronically transmitted the attached document to the Clerk's office using CM/ECF System for filing. Notice of this filing is sent by email to all parties by operation of the Court's electronic filing system.

/s/ Brunn W. Roysden III