IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

STATE OF ARIZONA; STATE OF MONTANA; and STATE OF OHIO, *Plaintiffs*, v. JOSEPH R. BIDEN, et al., *Defendants*.	:	Case No. 3:21-cv-314 Judge Michael J. Newman

---

COMBINED REPLY IN SUPPORT OF PRELIMINARY INJUNCTION AND MEMORANDUM OPPOSING DISMISSAL

TABLE OF CONTENTS

Page

number of criminal aliens within the States, all of whom will impose costs on the States in terms of the services they use and (in the case of recidivists) the crimes they commit. *Texas v. Biden (MPP)*, 20 F.4th 928, 967–69 (5th Cir. 2021); *Texas*, 2021 WL 3683913, at *12.

Even if the States could not satisfy the traditional standing inquiry, they are entitled to special solicitude which also enables them to satisfy the standing requirement. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). The States have a quasi-sovereign interest in their sovereign territory and the movement of people within it. *Id*.

2. The Permanent Guidance is reviewable.....32

The APA creates a "strong presumption in favor of judicial review." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). "[A] very narrow exception" to the presumption in favor of judicial review exists when an action is "committed to agency discretion by law." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); 5 U.S.C. §701(a)(2). This exception applies only to the most standardless of statutes. The Sixth Circuit recently determined that an immigration provision permitting that DHS "may" grant work authorization to any alien with a "pending, bona fide application" provides a standard for judicial review. *Barrios Garcia v. DHS*, 14 F.4th 462 (6th Cir. 2021). The statutes here are even more definitive.

The Permanent Guidance is a final agency action. To constitute final agency action, the "action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The Permanent Guidance creates such consequences. While the statutes obligate DHS to take into custody all §1226(c) aliens when they are released from criminal custody and quickly remove aliens with final orders of removal, the Permanent Guidance requires "something quite different." *Texas*, 2021 WL 3683913, at *25. ICE officers who previously had statutory authority to interrogate and arrest aliens designated as removable by Congress, have been *stripped* of that discretion by the Permanent Guidance, and are instead "require[d]" to perform "an assessment of the individual and the totality of the facts and circumstances," which may or may not lead to an arrest of an individual previously subject to enforcement action by law. R.4-1, PageID#100. In addition, the Permanent Guidance creates legal obligations for the States. The plaintiff States are "required to spend state monies on Emergency Medicaid, including for unauthorized aliens." Compl., R.1, PageID#7.

DHS points to three provisions in the Immigration and Nationality Act that it contends strip the Court of its power to hear this case. None does. Section 1252(b)(9) applies only to cases in which one hopes to challenge an "action" to "remove an alien." 8 U.S.C. §1252(b)(9). Section §1226(e) "applies only to

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes an Constitutional Provisions

Other Authorities

INTRODUCTION

The Government's argument is "as dangerous as it is limitless." *Texas v. Biden (MPP)*, 20 F.4th 928, 997 (5th Cir. 2021). Its brief claims a discretionary, *unreviewable* authority to ignore statutory commands. If accepted, its arguments would make "DHS a genuine law unto itself." *Id*.

Perhaps such an argument would have some purchase in a different era—an era before the Supreme Court's decisions in *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), and *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021). Those decisions made clear that neither the President nor executive agencies have authority to disregard or change immigration policy as they please, free from judicial oversight. Today, courts hold DHS to its authorizing statutes and to the Administrative Procedure Act. Indeed, it is vital that they do so: the States and their citizens are wholly dependent on the federal government's faithful execution of those laws, because (according to the Supreme Court) the States lack the power to enforce immigration laws themselves, *see Arizona v. United States*, 567 U.S. 387, 400–10 (2012).

The Permanent Guidance is precisely the sort of policy that ought to be enjoined. Indeed, one district court already enjoined its predecessor policy. *See Texas v. United States*, No. 6:21-CV-00016, —F.Supp.3d—, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021). After the Fifth Circuit stayed that injunction in part, the *en banc* Fifth Circuit vacated the panel's opinion, effectively restoring the district court's injunction. *See Texas v. United States*, No. 21-40618, Order (Nov. 30, 2021). Rightly so. The Permanent Guidance is not an enforcement policy, but rather an abdication of enforcement responsibility; it drastically *curtails* the ability of immigration officials to enforce the law. The policy cannot be passed off as an effort to prioritize public safety—the Administration's detention and removal of criminal aliens has dropped drastically under the Permanent Guidance and its predecessor policies. Nor can the policy be justified as an attempt to preserve

resources—issuing detainers for aliens leaving criminal confinement, as demanded by 8 U.S.C. §1226(c) but made optional by the Permanent Guidance, *preserves* precious time and personnel.

The Permanent Guidance is an abdication of statutory duty, supported by a contrived rationale. The Permanent Guidance is contrary to law, it is not the product of reasoned decisionmaking, and it was issued without the benefit of public comment. And, unless it is enjoined, it will impose substantial, unrecoverable financial injuries on the States, threaten their quasi-sovereign interests, and jeopardize the safety of their citizens. This Court must enjoin DHS from enforcing the Permanent Guidance.

LEGAL STANDARDS

The States seek a preliminary injunction under Rule of Civil Procedure 65(a) to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). As the moving party, a plaintiff can obtain a preliminary injunction by showing that (1) it is "likely to succeed on the merits," (2) it is "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter v. NRDC,* 555 U.S. 7, 20 (2008).

The defendants—this brief will refer to them collectively as "DHS"—object to the entry of a preliminary injunction. They also move to dismiss the case under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Those rules have standards of their own.

"A Rule 12(b)(1) motion may attack jurisdiction facially or factually." *Stout v. United States*, 721 F. App'x 462, 465 (6th Cir. 2018). Facial challenges test "the pleading's sufficiency, not the veracity of its allegations." *Id.* So, to survive a facial challenge, the complaint "must contain non-conclusory facts which, if true, establish that the district court had jurisdiction over the dispute." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012). In contrast, a

"factual attack" challenges "a complaint's factual predicate." *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co., Ltd.*, 807 F.3d 806, 810 (6th Cir. 2015). In resolving factual attacks, the "court has broad discretion with respect to what evidence to consider … including evidence outside of the pleadings, and has the power to weigh the evidence." *Cartwright v. Garner*, 751 F.3d 752, 759–60 (6th Cir. 2014).

Rule 12(b)(6) works differently. "To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). To determine whether the plaintiff has set forth a "plausible" claim, the Court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994).

ARGUMENT

Recall what the Permanent Guidance does. Citing "[j]ustice and our country's well-being," it declares that DHS will not arrest and remove aliens whose arrest and removal Congress made mandatory *unless* the agency, based on its independent consideration of non-statutory factors, deems arrest or removal appropriate. Permanent Guidance, R.4-1, PageID#99–101. To this end, the Permanent Guidance creates various priority categories of aliens eligible for apprehension and removal. The first category includes aliens suspected of terrorism or espionage. The Permanent Guidance makes their apprehension and removal a top priority. *Id*. at PageID#100. As to these aliens, the Permanent Guidance is largely faithful to Congress's mandates, which *require* the arrest,

detention, and removal of aliens who engage in or will likely engage in terrorist activity. 8 U.S.C. §1226(c)(1)(D); §1231(a)(1)–(2). The second priority category comprises aliens who pose a threat to public safety. But with respect to this category—which includes aliens convicted of crimes for which Congress made arrest *mandatory*, 8 U.S.C. §1226(c)(1)(B)—the Permanent Guidance "requires an assessment of the individual and the totality of the facts and circumstances," rejecting "bright lines or categories." R.4-1, PageID#100. Thus, with respect to this second category of aliens, the Permanent Guidance makes optional what Congress explicitly made mandatory. The Permanent Guidance nowhere allows the prioritization of aliens with final orders of removal—this despite the fact that federal law requires DHS to remove all such aliens within 90 days of the removal order's issuance. 8 U.S.C. §1231(a)(1).

This case presents the question whether the Court should preliminarily enjoin the Permanent Guidance's enforcement. It should, because all four of the factors governing the preliminary-injunction analysis favor the States: the States are likely to prevail on the merits; they will be irreparably harmed without an injunction; the balance of equities tip in their favor; and the public interest favors issuance of an injunction. DHS's arguments to the contrary all fail.

I. The States are likely to succeed on the merits

The Permanent Guidance is contrary to law, arbitrary and capricious, and was illegally promulgated without notice and comment. This Court should enjoin it.

A. The Permanent Guidance is contrary to law

In 1996, "justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal proceedings," *Demore v. Kim*, 538 U.S. 510, 513 (2003), Congress passed and President Clinton signed major reforms to the immigration code. Those reforms included the two statutory provisions at issue here. *See* Illegal

Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009–546. Namely, 8 U.S.C. §1226(c)(1) and §1231(a)(1)(A). The text, statutory context, purpose, legislative history, and caselaw addressing these provisions make clear that Congress created a mandatory, non-discretionary duty to arrest, detain, and remove specified aliens. The Permanent Guidance ignores the mandatory nature of these statutes. The Permanent Guidance is thus contrary to law. And, under the APA, this Court "shall … set aside agency action" that is "not in accordance with law." 5 U.S.C. §706(2)(A). The States are likely to prevail in having the Guidance set aside.

1. Section 1226(c)(1)

a. Section 1226(c)(1) imposes duties on U.S. Immigration and Customs Enforcement, or "ICE," which is part of DHS. It says that ICE "shall take into custody," specified aliens—including aliens convicted of crimes of moral turpitude, drug crimes, aggravated felonies, firearm offenses, espionage, and human trafficking—upon their release from criminal custody. 8 U.S.C. §1226(c)(1). This provision broadened existing law, which required ICE's predecessor agency to take into custody only narrowly defined "aggravated felons" upon their release. 8 U.S.C. §1252(a)(2)(A) (1994). Congress expanded ICE's removal duties quite intentionally. "Congress adopted this provision against a backdrop of wholesale failure by the INS [now ICE] to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518. Congress recognized the incredible burden on state (and federal) law enforcement resources given the recidivism rate of criminal aliens not removed. *Id.* The Conference Report describing the new duties explains: "This *detention mandate* applies whenever such alien is released from imprisonment, regardless of the circumstances of the release." H.R. Rep. No. 104-828, at 210–11 (1996) (Conf. Rep.) (emphasis added).

Supreme Court precedent and statutory context leave no doubt that Congress achieved its goal of mandating arrest: the word "shall" imposes a non-discretionary duty to detain the specified aliens, and thus amounts to a detention mandate. Under §1226(c), the statutorily described "aliens *must be* arrested 'when [they are] released' from custody on criminal charges," and they must subsequently be detained. *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019) (alterations in original, emphasis added). Under "subsection (c)(1)," DHS "*must* arrest those aliens guilty of a predicate offense." *Id.* at 966. The agency has no discretion.

The Permanent Guidance violates this mandatory duty, and flagrantly so. For aliens suspected of terrorism or espionage, the Permanent Guidance allows categorical prioritization. R.4-1, PageID#100; 8 U.S.C. §1226(c)(1)(D). So far, so good. But for aliens who pose a threat to public safety, the Permanent Guidance prohibits "bright lines or categories," and "requires an assessment of the individual and the totality of the facts and circumstances." R.4-1, PageID#100. ICE officers are not allowed to "rely on the fact of conviction" as sufficient justification for arrest and detention. *Id*. at PageID#101. Instead, factors to consider include aggravating factors like the "gravity of the offense of conviction," and mitigating factors like "time since an offense," "mental condition," and whether a conviction was "vacated or expunged." *Id*. Congress drew bright lines. *E.g.*, 8 U.S.C. §1226(c)(1); 8 U.S.C. §1227(a)(2)(A)(ii) (aliens with multiple criminal convictions involving moral turpitude). As a result, aliens that Congress said in §1226(c)(1) must be taken into custody—for example, aliens convicted of "murder, rape, or sexual abuse of a minor," 8 U.S.C. §1101(43)(A)—may not be taken into custody under the Permanent Guidance. By permitting the non-apprehension of aliens whose apprehension and detention Congress made mandatory, the Permanent Guidance violates the law.

b. DHS responds with several lines of attack, each unavailing.

First, DHS argues that §1226(c)(1) governs only "detention," which the Permanent Guidance "does not touch upon." Mot. to Dismiss, R.29, PageID#723. But as the Supreme Court has already said, *Preap*, 139 S. Ct. at 959, subsection (c)(1) governs *arrests*, as the plain language dictates. 8 U.S.C. §1226(c)(1) ("shall *take* into custody" (emphasis added)). The Permanent Guidance, contrary to §1226(c)(1), permits DHS *not* to take into custody individuals whose arrest (c)(1) makes mandatory. *See* R.4-1, PageID#100–01.

Second, DHS insists that "shall" means "may." In making this argument, DHS points to the backdrop principle of prosecutorial discretion, which it says helps it "overcome" the statute's plain meaning. Mot. to Dismiss, R.29, PageID#723. DHS reads §1226(c) to have a hidden step: *first* DHS must decide whether to arrest a criminal alien leaving custody, and *only then* shall DHS "take into custody" any alien who fits the statutory categories. "The Government's interpretation happens to fit this case precisely, but it needs more than that to recommend it." *DHS v. MacLean*, 574 U.S. 383, 394 (2015). Its reading would turn the mandatory language in §1226(c) into the discretionary authority described in §1226(a)—discretionary authority under which DHS "may" arrest and detain aliens during their immigration proceedings. Congress used permissive language in many other portions of the immigration laws, leaving DHS with varying degrees of discretion. *See* 8 U.S.C. §1226(a), (b), (c)(2); §1229c(a)(1), (a)(3), (b)(1), (e). That it failed to do so in §1226(c) thus carries a great degree of weight. "Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019).

DHS acknowledges that Congress *can* take away its discretion, but argues that it can do so only by using "truly" mandatory language like "only if." Mot. to Dismiss, R.29, PageID#723 n.17. This discussion appears in a footnote without reasoning or case law. The Court may therefore

properly treat the argument as waived. *See United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 856 (6th Cir. 2005). In any event, the language DHS refers to bolsters the States' theory. The provision to which DHS points allows detained criminal aliens to be released "only if" certain conditions are met. 8 U.S.C. §1226(c)(2). This suggests that DHS really does have a mandatory duty to arrest. "It would be superfluous for Congress to state how certain aliens may be released—per Subsection (c)(2)—if the Government was meant to initially have the discretion to decide which criminal aliens to detain in the first place." *Texas*, 2021 WL 3683913, at *34. It is a "cardinal principle of statutory construction" that a statute be construed to avoid rendering a clause superfluous. *TRW Inc. v. Andre*ws, 534 U.S. 19, 31 (2001) (citation omitted).

Finally, DHS suggests that *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), disallows courts from enforcing mandatory arrest statutes. But *Castle Rock* cannot be read to say that. That case largely highlights the Court's unwillingness to vest individuals with a substantive due process right to receive the protective services of a restraining order. *Id*. at 755. The Court did not bar Congress (or state legislatures) from imposing mandatory duties on the Executive, and it did not bar would-be plaintiffs from challenging policies that ignore such duties. Instead, the Court explained that, to create a property interest for purposes of the Fourteenth Amendment, "a true mandate of police action would require some stronger indication from the Colorado Legislature than" the use of "shall," given a backdrop of law-enforcement discretion. *Id*. at 760–61. That stronger indication exists here. In §1226, Congress deliberately employed both "may" and "shall" to create a reticulated scheme of both discretionary and mandatory enforcement action. It is hard to see how Congress could have been any clearer that the duty imposed by §1226(c) is mandatory.

Unsurprisingly, courts have had little trouble dispensing with DHS's repeated arguments that *Castle Rock* shields its misenforcement policies. *Texas (MPP)*, 20 F.4th at 997–98; *Texas* v. *United States*, 524 F.Supp.3d 598, 647–48 (S.D. Tex. 2021).

2. Section 1231(a)(1)

a. Congress enacted Section 1231(a)(1) to address another concern: that aliens who received removal orders were not being removed. The predecessor statute allowed the Attorney General six months to "effect" an alien's final order of departure, which the alien could delay by seeking judicial review, and granted the Attorney General "discretion" whether to detain the alien during that time. 8 U.S.C. §1252(c) (1994).

As the subcommittee chairperson bemoaned at the time: "There has been little progress in apprehending the tens of thousands of illegal aliens who abscond each year from deportation orders. Thus, as an illegal alien, even if we catch you, put you through proceedings and get an order of deportation, there is a very good chance, as high as 50 percent, that you still will remain in the United States." *Removal of Criminal and Illegal Aliens Hearing Before the House Subcommittee on Immigration and Claims*, 104th Cong. 2 (1996) (statement of Lamar Smith, chairman, Subcommittee on Immigration and Claims); *see also* S. Rep. No. 104-48, 24 (1995) ("as one would expect, [nondetained] criminal aliens who have received written notices to report for deportation often fail to appear for their actual deportation").

Section 1231(a) fixed that. It provides that ICE "shall remove" an alien with a final order of removal within 90 days. §1231(a)(1). Further, it says that "[u]nder no circumstance" may ICE release an alien found inadmissible on certain criminal grounds prior to that alien's removal. §1231(a)(2). In the eyes of the Congress, "[n]o set of reforms" in the 1996 law was "more

important" than §1231 "to establishing credibility in the enforcement against illegal immigration." H.R. Rep. No. 104-469, at 161 (1996).

"Shall" is mandatory in §1231(a)(1). Thus, the statute *requires* removal of covered aliens. Indeed, the Supreme Court has said so expressly, rejecting an argument that the "practical[] impossibility" of removing all aliens within 90 days renders the statutory language in Section 1231(a)(1) permissive. *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 (2021). While the remainder of §1231 provides for supervised release or prolonged detention to deal with cases where immediate removal is impractical, *id*., the statute gives DHS no discretion to simply treat aliens with final orders of removal as if they face no removal deadline at all. *See, e.g.*, *United States v. Barrera-Landa*, 964 F.3d 912, 922 (10th Cir. 2020) (determining that §1231(a) is "mandatory").

The Permanent Guidance flagrantly violates §1231(a)(1) by imposing an atextual barrier that ICE officers must overcome before removing aliens with final orders of removal. Indeed, the Permanent Guidance never mentions final orders of removal as a factor that can even influence an enforcement decision. This means, as Secretary Mayorkas confirmed to the U.S. Senate, that aliens who have been afforded tremendous process during their immigration proceedings—including the opportunity to seek relief such as asylum, withholding of removal, or cancellation of removal—and have finally been ordered removed, receive *de novo* review of the question whether their removal is appropriate. *See* Department of Homeland Security Oversight Hearing, CSPAN (Nov. 16, 2021), https://perma.cc/ZV3V-SH4P (interaction with Senator Grassley, at 42:26).

The Permanent Guidance, in effect, turns the mandatory 90-day removal period into a mere suggestion that will only rarely be observed. Despite that Congress defined "removal period" to mean 90 days, and used it *six times* throughout the section, DHS's interpretation would rewrite the

statute to mean "DHS may remove the alien within 90 days, after 90 days, or never." A time limitation has no meaning if removals are committed to DHS's sole and unreviewable discretion. For that reason, the Supreme Court has recognized elsewhere that "shall" combined with a defined time period creates a command: "'Shall' makes the act of filing a charge within the specified time period mandatory." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (alteration omitted). By making optional what Congress made mandatory, the Permanent Guidance violates the law.

b. DHS attempts to rewrite §1231(a)(1), again to no avail. As it did with respect to §1226(c), DHS insists that the necessary "shall" language is not the sort of *really truly* necessary language needed to impose a mandatory duty. But no interpretive rule requires Congress to reiterate that it really means what it says when it imposes a mandatory duty on the Executive. It would be odd if it did. Our Constitution says that Congress "shall make no law respecting an establishment of religion." Under DHS's theory, that prohibition is best read as a request, since the Founders did not write: "Congress shall make absolutely no law—literally, no law at all, we mean it—respecting an establishment of religion." That is of course absurd; legislative drafters do not have to reiterate that they mean what they say or use some uniquely mandatory language in order for courts to give effect to their mandatory commands and prohibitions.

DHS persists, pointing to a nearby subsection that includes the sort of mandatory language it imagines is required. That subsection, §1231(c)(2), provides "[u]nder no circumstance during the removal period shall the Attorney General release an alien" deemed, for example, inadmissible by reason of an aggravated felony, conviction of multiple crimes, or conviction of a crime of moral turpitude. Mot. to Dismiss, R.29, PageID#721–22. This clause, similar to other "notwithstanding any other provision of law" type clauses, does not make "shall" in subsection (a)(1) less mandatory,

but speaks to DHS's overriding duty to detain dangerous aliens despite specific provisions in §1231 that allow for release. *See, e.g.*, 8 U.S.C. §1231(c)(2)(A)(ii), (c)(2)(C) (allowing for a stay of removal and release to testify in court). Reading each subsection in context, Congress mandated that DHS remove aliens with final orders of removal within 90 days, provided specific exceptions from detention (none of which DHS invokes here), and barred DHS from applying those exceptions to certain aliens. Just because two mandates exist does not mean DHS is freed from complying with one of them. Nor does it make any difference that the mandatory language in §1231(a)(1) ("shall") is different than the mandatory language in §1231(c)(2) ("under no circumstance"). After all, no "canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013).

Indeed, the specific exceptions to the 90-day removal mandate affirm the States' reading. The *expressio unius* canon of construction proposes "that when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (alterations omitted) (quoting *Raleigh & Gaston R. Co. v. Reid*, 13 Wall. 269, 270 (1872)). Section 1231(a) allows the extension of the removal period when, for example, the "alien fails or refuses" to obtain travel documents. 8 U.S.C. §1231(a)(1)(C). These particular exceptions to the 90-day mandatory removal period indicate that the Permanent Guidance, which entirely swallows the mandate and its exceptions, fails to comport with the statute.

As its final point, DHS argues that the Permanent Guidance is no mandate at all, and thus consistent with any mandatory duty of removal, because it "does not prohibit the arrest of any noncitizen." Mot. to Dismiss, R.29, PageID#724. That is verifiably false. The Permanent Guidance creates a "break from a categorical approach to enforcement," which officers were previously

empowered to execute. *Secretary Mayorkas Announces New Immigration Enforcement Priorities*, Department of Homeland Security (Sept. 30, 2021), https://perma.cc/X9EQ-4MU7. The Permanent Guidance "*requires* an assessment of the individual and the totality of the facts and circumstances." R.4-1, PageID#100 (emphasis added). Stripping officers of their statutory authority and "requir[ing]" them to consider non-statutory factors is a mandate. And because the mandate strips officers of their discretion to remove aliens that the statute requires removed, the mandate is illegal.

B. The Permanent Guidance is arbitrary and capricious

Even if the Permanent Guidance were not contrary to law, the Court would have to set it aside on the ground that it is arbitrary and capricious. 5 U.S.C. §706(2)(A). An agency's decision is arbitrary or capricious where the agency "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Sierra Club v. United States Forest Serv.*, 828 F.3d 402, 407 (6th Cir. 2016) (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)). The Permanent Guidance is arbitrary and capricious because it rests upon a pretextual rationale and because the Administration failed to consider important aspects of the problem before it.

1. Pretext

a. Where the agency's offered rationale is pretextual—that is, where reality indicates a "significant mismatch between the decision … made and the rationale … provided"—the agency has failed to engage in reasoned decisionmaking and its action is properly set aside on the ground that it is arbitrary and capricious. *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2576 (2019). This is just such a case.

DHS justified the adoption of the Permanent Guidance by claiming it had "insufficient resources" to take enforcement actions against the more than 11 million illegal aliens in the country—not mentioning that only a small fraction are serious criminals subject to §1226(c)(1) or have received final orders of removal. Considerations Memo, R.27-2, PageID#447–49. DHS claimed that it wanted to "focus[] the agency's efforts on those noncitizens who pose the greatest threat to national security, public safety, and border security." *Id*. But there is a rather substantial mismatch between that explanation and the agency's action. In particular, ICE has requested *fewer* resources from Congress than it currently receives and is removing *fewer* aliens that pose a public safety threat than ever before. DHS's purported lack of resources to effect its mission cannot be squared with its request to Congress for a $78 million *decrease* in detention resources (to reduce the number of ICE beds available). DHS Budget Request Analysis: FY2022, Congressional Research Service 13 (June 25, 2021), https://perma.cc/3KVA-7ZUN.

In addition, DHS's necessary assumption—that ICE previously failed to focus on dangerous aliens—is patently false. ICE has always focused on public safety threats. In 2020, *92 percent* of interior removals had criminal convictions or pending criminal charges. U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report at 4 ("2020 ICE Report"), https://perma.cc/WG7U-TUEQ. In 2019, that number was 86 percent. U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report at 12 ("2019 ICE Report"), https://perma.cc/E3MS-DLEP. Nowhere does ICE claim that it lacks sufficient resources to prioritize the detention and removal of criminal aliens. ICE, to be sure, has insufficient resources to arrest and detain the more than 11 million illegal aliens in the United States. But these largely nonmandatory cases have nothing to do with the present dispute—many

of these 11 million aliens are not specified aliens under §1226(c) or §1231(c)(1), and so neither section requires the agency to do anything with respect to these aliens.

The facts on the ground reveal further mismatches between DHS's statements and its actions. DHS says the Permanent Guidance is needed so that it may "take action against a greater number of noncitizens who pose a more significant threat to public safety." Mot. to Dismiss, R.29, PageID#706. But according to ICE's own data, uncovered under the Freedom of Information Act, removals of aliens convicted of serious crimes *dropped*. Between January and July of 2019, ICE removed 17,553 such aliens. During 2020 (the height of the pandemic), it removed 13,120 such aliens. But as of late 2021, it had removed only *6,000* such aliens during the year. Jessica M. Vaughan, *Deportations Plummet Under Biden Enforcement Policies*, Center for Immigration Studies (Dec. 6, 2021), https://perma.cc/U8YJ-BT76. The drop-off in total removals is even more dramatic. From January through July of 2021, ICE removed *ten times* fewer aliens than it did during the same period in 2019 (18,713 aliens compared with 186,089). *Id*. The 2021 removals also pale in comparison to the 93,247 aliens that ICE removed during the height of the pandemic lockdown in 2020. *Id*. So accepting the notion that DHS is doing any of this because it wants to better enforce the immigration laws would require the Court "to exhibit a naiveté from which ordinary citizens are free." *Dep't of Comm.*, 139 S. Ct. at 2575 (citation omitted).

DHS, perhaps sensing the problem, preemptively addressed it in its Considerations Memo with one unrepresentative statistic. DHS's memo notes that ICE arrested 6,046 aliens with aggravated felony convictions from February 18 through August 31, 2021, compared with only 3,575 aliens during the same period in 2020. R.27-2, PageID#459; *accord* Mot. to Dismiss, R.29, PageID#697, 706, 733–34. This statistic *looks* impressive only if one forgets that, during the same period in 2020, the world was in the heart of the pandemic. And as ICE itself has recognized, the

pandemic required the agency to take "safety measures" that, "along with extremely low numbers of CBP apprehensions along the Southwest Border due to the use of 42 U.S.C. §§ 265 and 268 authority, … resulted in temporary decreases in many of ICE ERO's traditional metrics." 2020 ICE Report at 3. So this one statistic does nothing to change the fact that, contrary to DHS's insistence, the Permanent Guidance is about ignoring immigration law, not about enforcing it.

In sum, "the evidence tells a" very clear story, *Dep't of Comm*., 139 S. Ct. at 2575: ICE is removing fewer aliens, including fewer aliens convicted of serious crimes, and requesting fewer resources. That story "does not match the explanation" DHS provided for the Permanent Guidance. *Id*. The rule is thus pretextual and should be held invalid on that basis.

b. DHS does not say anything that casts doubt on this. It insists that the "expansive administrative record" refutes the notion that its stated desire to efficiently manage resources was pretextual. Mot. to Dismiss, R.29, PageID#729. But it does not and could not say anything to make its actions consistent with its statements.

2. Failure to consider important aspects of the problem

Whatever else one might say about §1226(c) and §1231(a), this much is clear: they prove that Congress strongly preferred for DHS to arrest criminal aliens, §1226(c), and to expeditiously remove aliens with final orders of removal, §1231(a). Yet the Permanent Guidance overrides these preferences. And in promulgating the Permanent Guidance, DHS ignores the reasons—four in particular—that motivated Congress to enact these provisions. The agency thus "failed to consider ... important aspects of the problem" before it, which means it acted arbitrarily and capriciously. *Regents*, 140 S. Ct. at 1910. This subsection of the brief addresses each of the ignored issues in turn.

a. First, DHS failed to consider the problem of recidivism. Congress, in §1226(c), required the detention of criminal aliens because of its concern with recidivism. *See Demore*, 538 U.S. at 518–19. Prior to Congress's acting, "deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Id.* at 518. DHS argues that the Permanent Guidance, by creating aggravating and mitigating factors bearing on the question whether to arrest a public safety threat, indicate that DHS considered the risks of recidivism. Mot. to Dismiss, R.29, PageID#726. But what are the costs of recidivism DHS identified, and what benefits of the Permanent Guidance outweigh them? DHS never said. "Stating that a factor was considered ... is not a substitute for considering it." *Texas (MPP)*, 10 F.4th at 556; *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) (same).

Instead of acknowledging the costs that recidivism will create for state and local communities, DHS asserts that recidivism is unimportant for crimes like "controlled substance offense[s]" and that illegal aliens are less likely to recidivate than U.S. citizens. Considerations Memo, R.27-2, PageID#455; Michael T. Light, et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, Proceedings of the Nat'l Acad. of Sciences of the USA (Dec. 12, 2020), PageID#578 (AR DHSP_00002494). But recidivism, even for crimes apparently unimportant to DHS, create real costs for States (who are facing a controlled-substance crisis of epic proportions). That is true even if the rates are, in absolute terms, low. In any event, ICE's own data suggest that the rates *are not* low. ICE's own report issued in 2019 found that, of "the 123,128 ERO administrative arrests in FY 2019 with criminal convictions or pending criminal charges, the criminal history for this group represented 489,063 total criminal

convictions and pending charges as of the date of arrest, which equates to an *average of four criminal arrests/convictions per alien*, highlighting the recidivist nature of the aliens that ICE arrests." 2019 ICE Report at 12 (emphasis added). When a "new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy," the agency must provide "a more detailed justification" than usual to avoid arbitrariness and capriciousness. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). DHS owed the public precisely such an explanation. It did not provide one.

Even assuming recidivism is less of a concern now than in 1996, when Congress passed and President Clinton signed §1226(c) into law, this only highlights that Congress's enacted scheme works to disincentivize crime. And if DHS abided by §1226(c)'s command, the recidivism rate would be zero for serious crimes. DHS failed to acknowledge this, and so failed to meaningfully consider the costs that recidivism imposes on the States.

DHS's brief does not improve upon the matter. Instead, it regurgitates language from the Considerations Memo regarding recidivism—and, in particular, crime rates among illegal aliens generally, as opposed to recidivism among *criminal* aliens. Mot. to Dismiss, R.29, PageID#726–27. The brief also notes that DHS addressed concerns with recidivism "by calling for a context-specific consideration of aggravating and mitigating factors." *Id*. at PageID#726. But that does not show that DHS considered the costs of recidivism that would result from its approach—it shows only that DHS's approach might allow it to account for recidivism later, with respect to individual aliens.

b. Second, DHS failed to explain why it has imposed barriers to lodging and effectuating detainers—barriers that will exacerbate its (pretextual) resource-conservation problem. Remember that federal law (and earlier DHS policy) requires the categorical prioritization of §1226(c)

aliens leaving criminal custody. Thus, DHS is able to *preserve* tremendous resources by effectuating an arrest in a secure setting, while the alien is being released from criminal custody. As ICE Enforcement and Removal Operations (ERO) has itself explained, "[d]etainers reduce potential risks to ERO officers and the general public by allowing arrests to be made in secure custodial settings as opposed to at-large in communities, conserve scarce government resources, and allow ERO to assume custody of criminal aliens before they have an opportunity to reoffend." 2019 ICE Report at 16. Under the new scheme, however, DHS will detain far fewer aliens in those secure settings. Instead, it allows thousands of aliens subject to mandatory detention to be released into the communities at large, which will require tremendous resources should DHS later decide or need to make an arrest. DHS did not address this problem—it did not explain how it might *conserve* resources by adopting a policy that would require *greater* expenditure of resources. Its brief does not address the matter either. R.29, PageID#727.

c. Third, the Permanent Guidance fails to meaningfully consider the impact on States. In its Considerations Memo, DHS incredibly argues that the Permanent Guidance will have a "net positive effect" on States. R.27-2, PageID#457. But again, courts are "not required to exhibit a naiveté from which ordinary citizens are free," *Dep't of Comm.*, 139 S. Ct. at 2575 (citation omitted), and this assertion is so at odds with the facts that it proves DHS gave no consideration to the issue. ICE initial book-ins, from interior arrests, plummeted to 2,422 in December, down from 4,267 in November. *See* FY 2022 ICE Detention Statistics, U.S. Immigration and Customs Enforcement, https://perma.cc/D6ST-RYSQ (view Detention FY22 tab, row 22 column L). In December 2019, ICE experienced 9,900 interior book-ins—four times more. FY 2020 ICE Detention Statistics, U.S. Immigration and Customs Enforcement, https://perma.cc/636D-CXMS (Detention EOFY2020 tab, row 22 column L). And in 2020, despite the challenges of the COVID-19

pandemic, ICE still managed to reach 6,070 initial book-ins. FY 2021 ICE Detention Statistics, U.S. Immigration and Customs Enforcement, https://perma.cc/3M3X-DZ7D (Detention FY21 YTD Tab, row 22 column L).

Notwithstanding this data, DHS would have this Court believe that failing to arrest and detain these aliens, the vast majority of whom are convicted or charged criminals, *see* 2019 ICE Report at 12; 2020 ICE Report at 23, has a positive impact on the States. How? DHS did not explain in the administrative process, it does not explain in its brief, and it is hard to imagine what it possibly could say.

DHS's back-up argument is that *state* considerations do not really matter, so long as a policy furthers a *federal* goal. "Enforcement decisions made by the Department of Justice Civil Rights Division and the Environmental Protection Agency can have profound fiscal impacts on states and localities, but those actions are nevertheless pursued when they advance the important mission of those Federal agencies." Considerations Memo, R.27-2, PageID#458. There are two fatal problems with that line of analysis. First, even if DHS could reject concerns about the costs to the States after reasoned evaluation, it *may not* fail to consider those costs—ignoring important aspects of a problem is always arbitrary and capricious, *Regents*, 140 S. Ct. at 1910, and the effects of a federal policy on the several States is certainly important. The second problem is that the Permanent Guidance fails to achieve the federal mission as defined by Congress, and instead seeks to achieve "equity for all"—an undefined phrase entirely absent from the 1996 law. Considerations Memo, R.27-2, PageID#449. An agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). By elevating vague allusions to equity over Congress's actual requirements, the agency acted arbitrarily and capriciously.

d. Finally, DHS chose to "prioritize" some of Congress's defined categories, like terrorists, without prioritizing others. But it gave no explanation for doing so. Aside from pretextual concerns about resource constraints and incoherent concerns about the ability to arrest and detain 11 million aliens (the vast majority of whom are not covered by the statutes at issue), DHS failed to explain its decision to treat some criminal aliens worse than others, not to mention its decision to treat recent border crossers worse than criminal aliens or aliens with final orders of removal. That too was arbitrary and capricious. DHS's vague insistence that the Guidance "takes into account national security, public safety, and border security while still ensuring that the officers on the ground consider the totality of the circumstances when taking enforcement actions," Mot. to Dismiss, R.29, PageID#729, does not suffice. Once again, "[s]tating that a factor was considered … is not a substitute for considering it." *Texas (MPP)*, 10 F.4th at 556.

C. The Permanent Guidance required notice and comment

There is a third, independent basis for enjoining the Permanent Guidance: it was unlawfully issued outside of notice-and-comment rulemaking.

1. In general, all rules that affect "individual rights and obligations," also called substantive or legislative rules, must be promulgated through notice and comment. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). In contrast, general statements of policy—statements without binding force—need not proceed through notice-and-comment rulemaking. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).

The Permanent Guidance is a substantive or legislative rule because it has binding force. It directs specific DHS operations beginning on its effective date (November 29, 2021). Aliens that do not fall within the category of individuals who pose a threat to public safety are almost

guaranteed *not* to be detained and deported. Even those who do fall within this category can be removed only once ICE officials conduct the Guidance's atextual balancing test.

Because the Permanent Guidance has binding force, it is a legislative or substantive rule. And because this substantive rule was not promulgated through notice-and-comment rulemaking, it is illegal. *See* 5 U.S.C. §706(2)(D); *Texas v. United States (DAPA)*, 787 F.3d 733, 745, 762–67 (5th Cir. 2015). The APA contains exceptions for narrow sets of rules that need not proceed through notice-and-comment rulemaking. 5 U.S.C. §553(b)(A)–(B); *see State of N. J., Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). But none applies here.

2. DHS argues its guidance merely advises the public how the agency proposes to exercise a discretionary power. Mot. to Dismiss, R.29, PageID#729–30 (citing *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993)). On that basis, it says the Guidance is not binding at all, but rather a general policy statement that need not go through notice-and-comment rulemaking. But, agency action is binding if it "either appears on its face to be binding" or "is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citations omitted). The Permanent Guidance is binding on its face. For the thousands of aliens previously subject to mandatory enforcement action under §1231(a) or §1226(c), the Permanent Guidance either removes them as priorities entirely or "requires an assessment of the individual and the totality of the facts and circumstance." R.4-1, PageID#101.

DHS also nods to boilerplate language, that the Permanent Guidance does not "create any right or benefit." Mot. to Dismiss, R.29, PageID#731–32. But, courts do not read these types of lawyer-required notices to overcome actual practice. *Texas (DAPA)*, 809 F.3d at 171.

As an unlawful substitute for notice and comment, DHS mentions it has engaged in "listening sessions" with the National Sheriffs' Association, the Southwest Border Sheriffs' Coalition,

the Major Cities Chiefs Association, and Advocates for Victims of Illegal Alien Crime, among others. *See* Considerations Memo, R.27-2, PageID#452-53; Memorandum re: Stakeholder Outreach (Sept. 17, 2021) (AR_DHSP_00000090). This is at best irrelevant, because agencies cannot shed their obligation to let the public participate in the notice-and-comment process by simply offering some other process. *See* 5 U.S.C. §553(b) (describing required notice). But what is more concerning is that DHS's claims do not appear to be accurate. The president of Advocates for Victims of Illegal Alien Crime, for example, disputes that DHS ever discussed the priorities with him or his organization. Stephen Dinan, *Critics of illegals policy deny federal 'outreach'*, Washington Times (Dec. 6, 2021) (Ex. T). The National Sheriffs' Association similarly contends it never had the opportunity to discuss or provide input on the enforcement priorities. *Id*. While potentially false statements in the administrative record are problematic, this powerless frustration from the public is precisely the ill that notice-and-comment procedures are intended to cure.

3. Relatedly, because the Permanent Guidance undoubtedly affects parties and would benefit from public participation, it is not the sort of rule "of agency organization, procedure, or practice" that is exempt from the notice-and-comment process. 5 U.S.C. §553(b)(A); *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 5 (D.C. Cir. 2011). States, which must now provide additional government services—including mandatory spending through Emergency Medicaid—and expend resources to deal with the costs of recidivism, are substantially impacted. Illegal aliens, who *DHS itself* argues are affected because they are now free to seek government services, are also impacted. R.27-1, PageID#458.

4. Similarly, a rule is substantive if it "encodes a value judgment," thereby "put[ting] a stamp of [agency] approval or disapproval on a given type of behavior." *Chamber of Comm. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999). DHS has placed a stamp of disapproval on enforcement

activities so unsubtle that not even the most obtuse line officer could miss it. Not only does the Permanent Guidance "encode[] substantive value judgment," but it affirmatively displaces Congress's. DHS can set policy explicitly premised on such fundamental value judgments—if at all—only after notice-and-comment rulemaking.

5. Finally, even a rule that may appear somewhat internal qualifies as a substantive rule where it alters the substantive standards by which an agency evaluates how to disburse its resources. *Texas (DAPA)*, 809 F.3d at 176–77 (citing *Nat'l Sec. Couns. v. C.I.A.*, 931 F. Supp. 2d 77, 107 (D.D.C. 2013)). Here, the Permanent Guidance alters the substantive standards by which DHS evaluates whether an alien who falls with §1226(c) or §1231(a)(1) will be arrested, detained, or removed. *See Texas*, 2021 WL 3683913 at *57.

D. The States have a valid Take Care claim

The States alleged in their complaint that the President is violating the Take Care Clause, U.S. Const., art. II, §3, by refusing to faithfully enforce the Nation's immigration laws. The problem is not simply that the President is prioritizing some matters over others—the problem is that, through the Permanent Guidance, he is deeming §§1226(c)(1) and 1231(a) inoperative. The Take Care Clause is supposed to prevent such decrees. It repudiates the power, sometimes claimed by English kings, to suspend or otherwise nullify the law. Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873 (1994).

Although the States did not seek a preliminary injunction based on this claim, they did allege a claim under the Take Care Clause in their complaint. DHS asks this Court to dismiss it. It contends that the Take Care Clause is nonjusticiable and thus fails as a matter of law. Mot. to Dismiss, R.29, PageID#732–33. That would be surprising if it were right, as the Supreme Court

not long ago ordered the parties in one case to brief the question whether another immigration-nonenforcement policy "violate[d] the Take Care Clause of the Constitution." *United States v. Texas*, 577 U.S. 1101 (2016). True enough, courts lack the authority to order or enjoin the President's decisions with respect to acts the law leaves to his discretion. *Dalton v. Specter*, 511 U.S. 462, 476 (1994). And true enough, that precludes the courts from adjudicating alleged violations of the Take Care Clause claims that simply take umbrage with the President's handling of matters left to his discretion. *See Mississippi v. Johnson*, 71 U.S. 475, 499 (1866). But the Supreme Court has never held that Take Care Claims brought against inferior officers are nonjusticiable. *See South Carolina v. United States*, No. 1:16-CV-00391-JMC, 2017 WL 976298, at *28 (D.S.C. Mar. 14, 2017). Nor has it held that Take Care Clause claims are nonjusticiable when they allege not simply that the President has failed to faithfully enforce the law, but rather that he has affirmatively refused to enforce it at all by adopting a policy that contradicts its terms. That was precisely the sort of policy with respect to which the Supreme Court sought briefing in *Texas*. And it is precisely the sort of policy that is at issue in this case. The claim is justiciable and ought not be dismissed.

E. The States have standing to sue and the Court may review the Permanent Guidance's legality

Perhaps sensing that it will lose on the merits, DHS endeavors to stop the Court from reaching them. More precisely, it claims that the States lack standing to sue and that the Permanent Guidance is unreviewable in any event. The Court should reject these arguments.

1. The States have Article III standing to sue

Every court to have considered the question whether the States have standing to challenge the Permanent Guidance's predecessor policy answered that question in the affirmative. *Texas*, 2021 WL 3683913, at *9–20; *Arizona v. DHS*, No. CV-21-00186, 2021 WL 2787930, at *8 (D. Ariz. June 30, 2021); *Florida v. United States*, No. 8:21-CV-541, —F.Supp.3d.—, 2021 WL

1985058, at *8 (M.D. Fla. May 18, 2021), *vacated as moot*, No. 21-11715, 2021 WL 5910702 (11th Cir. Dec. 14, 2021). The same logic applies to the Permanent Guidance and the same outcome ought to obtain.

Plaintiffs have Article III standing if they suffer an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a favorable ruling. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). An injury in fact is "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (quotation marks omitted). States are "entitled to special solicitude" throughout this analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Here, the States have standing because they have sustained two types of injuries, both of which are fairly traceable to the Permanent Guidance and that would be redressed by an order enjoining the Guidance.

One note before proceeding further. DHS suggests that the Court, if it finds that one State but not the others have standing, may dismiss the States without standing from the suit. That is incorrect. As long as one party has standing to sue, the case is properly before the Court and there is no need to dismiss any plaintiff. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). True enough, courts may deny relief sought only by a party without standing to sue. *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017). But here, all three States are seeking precisely the same relief: an order enjoining the Permanent Guidance, nationwide. No narrower form of relief will suffice. Because aliens that DHS illegally fails to arrest or remove can travel between the States, enjoining the Permanent Guidance in some places but not others will not fully redress the States' injuries. Even if nationwide injunctions are improper in cases where narrower relief will fully redress the plaintiffs' injuries, *see DHS v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in grant of stay), nothing less than an order enjoining DHS from enforcing its

Permanent Guidance anywhere will "redress the injuries sustained by [the] particular plaintiff[s] in [this] particular lawsuit," *id*.

The Permanent Guidance causes financial harm to the States. A plaintiff with a "likelihood of economic injury" due to government action has suffered a concrete injury. *Clinton v. City of New York*, 524 U.S. 417, 432 (1998). The Permanent Guidance imposes precisely this form of injury on all three States. Why? Because it will cause a drop in immigration enforcement, including for criminal aliens, compared to the scheme contemplated by statute. The Permanent Guidance will therefore increase the number of criminal aliens within the States, all of whom will impose costs on the States in terms of the services they use and (in the case of recidivists) the crimes they commit. *See Texas (MPP)*, 20 F.4th at 967–69; *Texas*, 2021 WL 3683913, at *12. The Government does not refute this. Nor could it, particularly at the motion-to-dismiss stage.

Under the Permanent Guidance and the similar policies that immediately preceded it, ICE drastically cut back on taking custody of criminal aliens. In December 2021, ICE detained an average of only 4,296 aliens per day with criminal convictions or pending criminal charges resulting from interior enforcement. FY2022 ICE Detention Statistics, U.S. Immigration and Customs Enforcement, https://perma.cc/D6ST-RYSQ ("Detention FY22" tab, lines 73+74). Compare that to December 2019, when ICE averaged 16,388 detentions per day. FY 2020 ICE Detention Statistics, U.S. Immigration and Customs Enforcement, https://perma.cc/636D-CXMS ("Detention EOFY2020" tab, lines 56+57). And, although stressed by pandemic lockdowns, that number reached 10,336 in December 2020. ICE Detention Statistics, U.S. Immigration and Customs Enforcement, https://perma.cc/3M3X-DZ7D ("Detention FY21 YTD" tab, lines 73+74).

Given that ICE is not detaining (and thus not removing) criminal aliens at even approximately the same rate, the Permanent Guidance will increase the number of criminal aliens requiring

State resources, including community supervision. Compl., R.1, PageID#10. The release of criminal aliens also creates foreseeable costs on law enforcement in dealing with recidivism. ICE's own data acknowledge the point. In 2020, of the 93,061 administrative arrests of aliens with criminal convictions or pending criminal charges, "the criminal history for this group included more than 374,000 total criminal convictions and pending charges as of the date of arrest—an average of four per alien." 2020 ICE Report at 13–14. The ratio was similar in 2019: 123,128 administrative arrests and 489,063 total criminal convictions and pending charges. 2019 ICE Report at 12. DHS's underenforcement will mean more of these individuals remain in the community, imposing costs associated with recidivist crime. DHS's failure to remove criminal aliens and aliens subject to final orders of removal also reasonably leads to increased unreimbursed costs in the form of emergency medical services, schooling, and other social services. Compl., R.1, PageID#9-15.

DHS tries to minimize the States' harm by citing *Linda R.S. v. Richard D.*, a case involving a plaintiff seeking jail time for an unsupportive father, where, unlike here, prosecution would not have affected the plaintiff financially. Mot. to Dismiss, R.29, PageID#705 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). But the States are not seeking the prosecution of particular individuals—they are seeking enforcement of the law generally. Further, as every court to have considered the predecessor memoranda has acknowledged, the States *do bear* financial consequences when ICE fails to arrest, detain, and remove aliens as required by statute. *See, e.g.*, *Texas*, 2021 WL 3683913, at *12 ("If even one alien not detained due to the Memoranda recidivates, Texas's costs 'will increase' in accordance with its current cost per inmate."); *Arizona*, 2021 WL 2787930, at *7 ("[F]or those noncitizens who commit state crimes, are then incarcerated, and

subsequently released but not removed by ICE, Arizona has to spend money to supervise their release into the community"). So *Linda R.S.* has no bearing on this suit.

DHS argues that Ohio and Montana, because they are not southern border states, cannot be harmed by ICE's failures. Not so. As of 2019, Ohio and Montana had an estimated 89,000 and 4,000 illegal migrants living within state borders. Compl., R.1, PageID#12, 14. Removable and criminal aliens in Ohio and Montana consume Emergency Medicaid, attend school, and recidivate, just like aliens in Arizona. One criminal act can impose a tragic toll. That Ohio's gross costs from illegal immigration may be less than Arizona's does not mean no harm occurs. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'").

DHS also complains that the costs to the States are speculative. In particular, DHS suggests that, while few public-safety threats were removed last year, many individuals who pose these threats will be removed in the future. According to DHS, the States are simply speculating when they say total enforcement will drop. But that is not the case, and DHS knows it. Removals of serious criminal aliens are down *more than three times* compared to the same period in 2019 and more than *twice* compared to 2020. *See supra* at 15. It is not speculative for the States to allege that the policy will continue to have the effects it has been proven to have in the world. DHS also argues state harms are speculative because the States benefit from ICE's focus on border security. DHS highlights in particular the decision to send 300 ICE officers to the southwest border while the February Memoranda was in place. Mot. to Dismiss, R.29, PageID#707–08. As an initial matter, it is impossible to believe that the totality of DHS's actions will alleviate the burdens its underenforcement imposes on the States. It certainly does not appear as though sending 300 ICE agents to the border alleviated the border crisis—November border encounters increased by more

than 100,000 compared to November last year. *Southwest Land Border Encounters*, U.S. Customs & Border Protection (last visited Jan. 10, 2022), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters. In any event, the fact that DHS is doing one thing that (allegedly) benefits the States does not free it to breach other duties that harm the States. Indeed, the agency in the past has managed to walk and chew gum at the same time: in 2019, ICE sent 350 officers to the border without abandoning its statutory duties. 2019 ICE Report at 12. The States presented credible evidence that the "pull factor" of limited interior enforcement, paired with an unsecure border, have incentivized a "record influx of fentanyl at the southern border, which is trafficked into Ohio communities." Compl., R.1, PageID#3-4, 14. DHS has not, and could not, rebut that.

DHS also argues that any harms the States suffer from expenditures made providing services to aliens would be "self-inflicted." Mot. to Dismiss, R.29, PageID#706. That is false. "Federal law affirmatively *requires* the States to make some of those expenditures." *Texas (MPP)*, 20 F.4th at 969 (citing 42 C.F.R. §440.255(c) (Emergency Medicaid)). Moreover, supervising criminals leaving prison is not a choice; States and their officers are charged with preserving the peace and safety of their communities, and take that duty seriously. DHS's flippant attitude toward community safety as some sort of choice is as dangerous as it is wrong.

Finally, DHS argues that setting aside the Permanent Guidance would not remedy the States' harms, because DHS could create a new prioritization scheme with an equally harmful effect on the States. Mot. to Dismiss, R.29, PageID#708–09. It is no doubt true that DHS could attempt to violate the law in ways other than the Permanent Guidance and engage this Court and the States in a game of whack-a-mole. Indeed, the Administration recently did something similar when another agency re-promulgated a nationwide moratorium on evictions nearly identical to one the Supreme Court had already signaled was unlawful. *See Ala. Assoc. of Realtors v. HHS*, 141 S.

Ct. 2485, 2487–88 (2021). While the States assume DHS has received the message, they request that any injunction clarify that the federal government "act in conformance with the standards set by Congress" in §1226(c) and §1231(a). *Texas*, 2021 WL 3683913, at *18. DHS cannot dispute that, "[u]nder Congress's standards, the States' injuries would be redressed." *Id*. In any event, the States are aware of no case in which a defendant defeated a plaintiff's standing by vowing not to abide by a court's interpretation of federal law.

The Permanent Guidance affects the State's quasi-sovereign interests. Even if the States could not satisfy the traditional standing inquiry, they are entitled to special solicitude which also enables them to satisfy the standing requirement. *Massachusetts*, 549 U.S. at 520. The Sixth Circuit recently affirmed that States may sue the Federal Government to vindicate quasi-sovereign interests. *Kentucky v. Biden*, No. 21-6147, —F.4th—, 2022 WL 43178, at *8, 9 (6th Cir. 2022). To invoke special solicitude, States can show a procedural right and a quasi-sovereign interest.

Here, the States have done just that. The APA creates procedural rights, including the right to be heard in the rulemaking process. *Massachusetts*, 549 U.S. at 517–20. And the States have a quasi-sovereign interest in their sovereign territory and the movement of people within it. *Id*. Certainly the States have an interest in vindicating their *federal* privilege not to expend their own resources because of criminal aliens that Congress has said *must* be taken into custody and removed. This theory of standing is strengthened by the fact that, according to the Supreme Court, States may not enforce immigration laws, and must instead rely on the federal government to do so. *Arizona*, 567 U.S. at 397. This dependence heightens the States' interests. In finding standing in *Massachusetts*, the Supreme Court relied on the autonomy States gave up in entering the Union and their reliance on the federal government to regulate emissions. *Massachusetts*, 549 U.S. at 518–19. The same is true here, except that, while Massachusetts could at least regulate emission

within its borders, the States "bear[] many of the consequences of unlawful immigration" but are powerless to control it. *Arizona*, 567 U.S. at 397. Moreover, if Massachusetts had standing to challenge EPA's non-regulation of carbon dioxide in a manner that might affect its coastline sometime over the next century, surely the Plaintiff States have standing to challenge DHS's actions that are directly and undeniably injuring their interests today.

2. The Permanent Guidance is reviewable

The APA creates a "strong presumption in favor of judicial review." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). DHS seeks to overcome that presumption. It says the Permanent Guidance is committed to agency discretion (and thus non-reviewable) by law, that the Guidance is not a "final agency action" subject to APA review, and that immigration statutes bar the Court from hearing the case. Those arguments are all wrong.

Committed to agency discretion. "[A] very narrow exception" to the presumption in favor of judicial review exists when an action is "committed to agency discretion by law." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); 5 U.S.C. §701(a)(2). But "to honor the presumption of review," the Supreme Court reads that exception "quite narrowly." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). More precisely, the exception applies only in "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* (quoting *Lincoln*, 508 U.S. at 191).

This exception applies only to the most standardless of statutes. To illustrate, consider the Sixth Circuit's recent decision in *Barrios Garcia v. DHS*, 14 F.4th 462 (6th Cir. 2021). In that case, the Court *rejected* the argument that DHS's delay in issuing work visas was committed to agency discretion. The relevant statute provided: "The [DHS] Secretary *may* grant work

authorization to any alien who has a *pending*, *bona fide* application for nonimmigrant status under section 1101(a)(15)(U) of this title." 8 U.S.C. §1184(p)(6) (emphasis added). That statute commits an awful lot of discretion to the Secretary. But not enough to bring it within the exception. The Circuit held that, despite the statute's discretionary "may," two other terms—"pending" and "bona fide"—supplied sufficiently judicially manageable standards to review the agency's action. *Barrios Garcia*, 14 F.4th at 481.

In light of *Barrios Garcia*, any argument that §1231(a) or §1226(c) are too standardless to permit judicial review borders on frivolous. These statutes are far more definitive—they *require* (by using the word "shall") DHS to arrest and deport defined aliens, *see supra* at 4–13—than the statute at issue in *Barrios Garcia*. The Supreme Court's unanimous decision in *Mach Mining* emphasizes the point. There, the statute provided that the Equal Employment Opportunity Commission, "shall endeavor to eliminate [an] alleged unemployment practice by informal methods." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). While "endeavor" is padded with discretion, the Court nonetheless determined the otherwise mandatory phrase provided a "serviceable standard" for judicial review. *Id*. at 488.

The States would admittedly have a harder time seeking review of any *particular* enforcement decision by DHS. *See Ohio Pub. Interest Research Grp., Inc. v. Whitman*, 386 F.3d 792 (6th Cir. 2004) (cited by Mot. to Dismiss, R.29, PageID#709–10). But the States are not doing that—they are not challenging the decision not to arrest or remove any particular individual. Instead, they are challenging a broad nonenforcement policy. And such policies are generally reviewable 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.'" *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d

671, 677 (D.C. Cir. 1994) (quoting *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)). DHS argues that, because it is still technically possible for any given alien to be removed, the Permanent Guidance cannot be understood as a policy of nonenforcement. Mot. to Dismiss, R.29, PageID#712. That argument misses the point. An alien may end up being removed under the Permanent Guidance not because DHS is faithfully enforcing the statutes, but because the alien is removable under standards DHS legislated itself and codified in the Permanent Guidance. Regardless of whether this challenge tackles a policy of non-enforcement or under-enforcement, it is *not* a challenge to any particular removal decision. And challenges to enforcement policies, as opposed to discrete enforcement decisions, are not barred by the committed-to-agency-discretion doctrine. *Texas (MPP)*, 20 F.4th at 978–88; *see also Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 485 (D. Md. 2019); *Pub. Citizen Health Rsch. Grp. v. Acosta*, 363 F. Supp. 3d 1, 18 (D.D.C. 2018).

DHS argues that the statutory text must be stronger than normal to displace a commitment to agency discretion in the law-enforcement context. Mot. to Dismiss, R.29, PageID#710-11. The States have already shown that the statutes are clear and so meet that hurdle, even if it applies. DHS responds that "[o]ther statutory provisions" vest DHS with discretion. Mot. to Dismiss, R.29, PageID#711. True enough. But in §1226(c) and §1231(a), Congress singled out circumstances in which DHS has limited discretion if it has any at all. The statutory text makes clear that Congress intentionally used "shall" to leave "the Executive no discretion but to take the alien into custody." *Arizona*, 567 U.S. at 456–57 (Alito, J., concurring in part and dissenting in part). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and brackets omitted)).

So the fact that *other* immigration statutes give the Executive broad discretion services only highlight the non-discretionary nature of the duty here at issue.

Moreover, in passing the 1996 law, Congress included a statutory note designed to ensure immigration officials could comply with this new duty. *See Preap*, 139 S. Ct. at 969 (discussing Transition Period Custody Rules, 110 Stat. 3009–586). This statutory note created a maximum two-year exception for the agencies to gather the necessary resources to comply with Congress's non-discretionary commands in §1226(c). This note implies what the rest of the statute makes clear: the statutory duties are mandatory. If they were discretionary, there would have been no need for Congress to create a two-year grace period.

Section 1368 confirms the mandatory nature of the duties here at issue. It requires DHS to report to Congress every six months, "estimating the amount of detention space" required for three separate categories of aliens. 8 U.S.C. §1368(b)(1). One category is "all aliens subject to detention under section 1226(c) of this title and section 1231(a) of this title," and *another* is "inadmissible or deportable aliens in accordance with the priorities established by the Attorney General." *Id*. In other words, Congress assumes that §1226(c) and §1231(a) aliens are *distinct* from those whom DHS may prioritize or deprioritize.

None of the cases DHS cites support its insistence that courts look away from unlawful enforcement policies. In *Reno v. AADC*, aliens with terrorist ties sought to avoid "selective prosecution" on freedom of association grounds. 525 U.S. 471, 472, 479 (1999). The Court, in overturning the Ninth Circuit's injunction prohibiting removal, emphasized that the need for judicial restraint in deportation proceedings was "magnified" because aliens have no legitimate interest in continuing to violate U.S. law. *Id.* at 946-47 (1999). The States, in contrast, are not asking the Court to create ongoing violations of U.S. law—they are asking the Court to *stop* an ongoing

violation. Courts, including the Supreme Court, have refused to invent atextual barriers to removal. *Jama v. ICE*, 543 U.S. 335, 351 (2005). Nothing in the Supreme Court's decisions suggests that courts should stand idly by while the Executive invents precisely those barriers and regulates them into law.

Final agency action. The presumption of APA review applies only to "final" agency actions. To constitute final agency action: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). If an agency "statement denies the decisionmaker discretion … then the statement is binding, and creates rights or obligations." *Gen. Elec.*, 290 F.3d at 382 (quoting *McLouth*, 838 F.2d at 1320).

The Permanent Guidance is a final agency action. Even DHS concedes that the Guidance marks the consummation of the agency's decisionmaking process. And as the Southern District of Texas recognized with respect to the predecessor policy, any argument that the Permanent Guidance does not "alter DHS's legal obligations" regarding detention is "demonstrably false." *Texas*, 2021 WL 3683913, at *24. After all, it plainly denies discretion to the relevant decisionmakers (immigration enforcement officials). While the statutes obligate DHS to take into custody all §1226(c) aliens when they are released from criminal custody and quickly remove aliens with final orders of removal, the Permanent Guidance requires "something quite different." *Id*. at *25. ICE officers who previously had statutory authority to interrogate and arrest aliens designated as removable by Congress, have been *stripped* of that discretion by the Permanent Guidance, and are instead "require[d]" to perform "an assessment of the individual and the totality of the facts and

circumstances," which may or may not lead to an arrest of an individual previously subject to enforcement action by law. R.4-1, PageID#100. Because the Permanent Guidance "*require[s]* DHS to enforce the law in a different way" than what Congress prescribed, the Permanent Guidance "constitute[s] a change in DHS's legal obligations." *Texas*, 2021 WL 3683913, at *25 (emphasis added). It limits the discretion afforded to immigration officials and is therefore binding.

The analysis is not affected by the boilerplate final sentence that DHS tacked on to the Permanent Guidance, which says that the Guidance does not "create any right or benefit." R.4-1, PageID#104. The disclaimer can say whatever it wants, but it cannot change the fact that the policy is binding in fact. Courts have said precisely the same thing about similar language. The Deferred Action for Parents of Americans program, for example, contained the same boilerplate language. But the court still found that the policy did not *genuinely* leave the agency and its employees free to exercise discretion. *Texas (DAPA)*, 809 F.3d at 171. Similarly, although the Deferred Action for Childhood Arrivals program stated that it was creating no rights on which recipients could rely, *Regents*, 140 S. Ct. at 1931 (Thomas, J., concurring in part), the Supreme Court held that the program *did* cause certain rights to vest in recipients, *see id*. at 1906–07 (majority).

In addition, the Permanent Guidance creates legal obligations for the States. The plaintiff States are "required to spend state monies on Emergency Medicaid, including for unauthorized aliens." Compl., R.1, PageID#7. DHS argues the States' increased obligations are one step removed from the Guidance, so the Permanent Guidance does not impose legal rights or obligations. R.29, PageID#714. This is wrong. For one, the States' obligation to engage in community supervision does not arise out of a chain of optional actions that lack "immediate and significant effects." *Parsons v. DOJ*, 878 F.3d 162, 168 (6th Cir. 2017). They instead arise directly every time a detainer is not executed and a criminal alien is released. The Supreme Court has, moreover, rejected

that an agency action must *directly* effect a consequence to *legally* effect it. In *Department of Commerce v. New York*, the plaintiff States could prove standing to challenge the Census Bureau's decision to add a citizenship question not because the question created rights or obligations on the States directly, but because the States were harmed by third parties' reacting to the citizenship question in "predictable ways." 139 S. Ct. at 2566; *see also Bennett*, 520 U.S. 154, 178 (1997) (invoking the traceability and redressibility standing analysis to determine whether agency action had "direct and appreciable legal consequences"). Here, because it is predictable that the Permanent Guidance will lead to underenforcement by the DHS, and because it is assured that the underenforcement will mean the States owe legal obligations to more criminal aliens, the Permanent Guidance itself can be said to impose costs on the States.

Not precluded by the Immigration and Nationality Act. Congress may limit judicial review of agency actions. But federal courts apply a "'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 575 U.S. at 486 (quoting *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). Those who contend review is precluded bear a "heavy burden of overcoming th[is] strong presumption." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). And when "substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). Here, DHS points to three provisions in the Immigration and Nationality Act that it contends strip the Court of its power to hear this case. None does.

First, consider 8 U.S.C. §1252(b)(9). That section provides:

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

(emphasis added). As the italicized phrase suggests, this section applies only to cases in which one hopes to challenge an "action" to "remove an alien." It does not speak to, and thus does not bar, challenges to immigration *policies*, as those do not involve the challenge of any such action. *See Regents*, 140 S. Ct. at 1907.

Second, 8 U.S.C. §1226(e). That section states that the "Attorney General's discretionary judgment regarding the application of this section shall not be subject to review." *Id*. And it forbids courts from "set[ting] aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." *Id*. By its plain terms, the section has no application here. It "applies only to 'discretionary' decisions about the '*application*' of §1226 to *particular cases*." *Preap*, 139 S. Ct. at 962 (emphasis added). Section 1226(e) "does not block lawsuits over 'the extent of the Government's detention authority under the "statutory framework" as a whole.'" *Id*. (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018)); *see also Demore*, 538 U.S. at 516–17. Here, the States "dispute the extent of the statutory authority that the Government claims." *Id*.

Finally, there is 8 U.S.C. §1231(h). It states:

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

According to DHS, because §1231, per subsection (h), does not create a substantive or procedural right, DHS has been freed of its obligations under the APA. But that does not follow.

The States are not bringing claims under section §1231—they are challenging the agency's policy regarding the enforcement of that statute under the APA, 5 U.S.C. §706. The Supreme Court has held that §1231(h) "simply forbids courts to construe *that section* 'to create any … procedural right or benefit that is legally enforceable.'" *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001). Just as "it does not deprive an alien of the right to rely on 28 U.S.C. §2241 to challenge detention that is without statutory authority," it does not deprive the States of the right to rely on the APA to challenge unlawful agency action. *Id*. at 688. "Section 1231(h)'s bar is irrelevant to this case" because the States do "not bring any claims under that section." *Nak Kim Chhoeun v. Marin*, 8:17-cv-1898, 2018 WL 1941756, at *5 n.3 (C.D. Cal. Mar. 26, 2018).

DHS contends otherwise, but to no avail. Indeed, if it were right, then Section 1231(h) would prevent any party challenging an agency decision from relying on Section 1231. But that is not the law. For example, courts frequently review the Board of Immigration Appeals' decisions denying withholding of removal for compliance with the standard set out in Section 1231(b)(3). *See, e.g.*, *Sealed Petitioner v. Sealed Respondent*, 829 F.3d 379, 380–81 (5th Cir. 2016). In such cases, DHS does not argue that Section 1231(h) prevents aliens from relying on the legal standard established in Section 1231.

DHS relatedly argues that the States are not within the "relevant zone of interests to pursue an APA claim premised on §1231." Mot. to Dismiss, R.29, PageID#718-20. "[A] person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). The test is not "especially demanding," given the APA's presumption of review, and the "benefit of any doubt goes to the plaintiff." *Id*. at 225. Nonetheless,

DHS says that the States are not within the zone of interests because they think *no one is*: according to DHS, because §1231(h) says that §1231 does not create substantive or procedural rights for "any party," *no one* is within the zone of interests and so *no one* is able to enforce §1231's terms in an APA action.

There are two problems with this argument, each independently fatal. First, when §1231(h) uses the phrase "any party," it is referring to any party *in a removal proceeding*. That is certainly what the legislative history suggests Congress meant. H.R. Rep. No. 104-828, at 219 (1996) (Conf. Rep.) ("This provision is intended, among other things, to prohibit the litigation of *claims by aliens who have been ordered removed* from the U.S. that they be removed at a particular time or to a particular place." (emphasis added)). More fundamentally, the question whether §1231 confers a substantive or procedural right on the States *is distinct from* the question whether they come within the statute's zone of interests. As the Supreme Court has explained, the inquiry into whether "the plaintiff falls within the general zone of interest that the statute is intended to protect" is a distinct inquiry from whether the statute "create[s] rights enforceable directly from the statute itself under an implied private right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). A plaintiff's "interests," that is, are "broader" than a plaintiff's "rights." *Id*. So the mere declaration that Section 1231 does not create a "right," *see* 8 U.S.C. § 1231(h), does not undermine the existence of the States' interests protected by Section 1231. As the foregoing discussion shows, the States' interests *are* implicated by the Executive's enforcement of §1231—especially given their inability to enforce immigration laws themselves, *see Arizona*, 567 U.S. at 397. So the States come within the zone of interests. And to the extent there is any doubt on this score, the States are entitled to the benefit of the doubt. *Match-E-Be-Nash*, 567 U.S. at 224. Perhaps for that reason, the only

court to have addressed the issue rejected the argument that the States fall outside of §1231's zone of interests. *See Texas*, 2021 WL 3683913, at *40–42.

In arguing otherwise, DHS points to *Hernandez-Avalos v. INS*, 50 F.3d 842, 845 (10th Cir. 1995)—an out-of-circuit, pre-*Gonzaga* decision, that supports the States to the extent it applies. Mot. to Dismiss, R.29, PageID#718. There, criminal aliens sought a writ of mandamus *requiring* their deportation, saying they were entitled to be removed under 8 U.S.C. §1251(i). *Hernandez-Avalos*, 50 F.3d at 843. The aliens *did not* seek relief under the APA. In footnoted dicta, the Tenth Circuit speculated that the aliens may have decided not to seek relief under the APA because of cases suggesting that "the APA is not applicable to deportation proceedings." *Id*. at 845 n.8 (citing *Kaczmarcyk v. INS*, 933 F.2d 588, 595 (7th Cir. 1991)). Those cases have no bearing here, as the States are challenging an immigration policy rather than the result of a deportation proceeding. In fact, the Tenth Circuit went on to recognize that laws requiring speedy removal were enacted not for the benefit of aliens, but rather for the "benefit of taxpayers," "federal, *state* and local prison systems, [and] the officials who run those systems." *Id.* at 847–48 (emphasis added). So too here. Section 1231, and the INA more broadly, were enacted to protect Americans from the costs that removable aliens impose. The States come within the zone of interests.

In any event DHS focuses too narrowly on Section 1231(h). "In considering whether the 'zone of interest' test provides or denies standing," an argument fails if it "focuses too narrowly on [a particular section], and does not adequately place [that section] in the overall context of the [act as a whole]." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987). Thus, the Court should look to "Congress' overall purposes in the" Immigration and Nationality Act. *Id*. The States' interests in reducing costs arising from criminal aliens and aliens who have final orders of removal, fall within the zone of interests of the Immigration and Nationality Act generally.

One final point. The States' arbitrary-and-capricious and notice-and-comment claims do not depend on Section 1231 at all. And its arguments regarding the Take Care Clause and the §1226 are not even arguably affected by §1231(h). Thus, *even if* the Court were to accept the zone-of-interest argument, or any other argument pertaining to §1231(h), it would not justify denying relief on every claim.

II. The Plaintiff States will suffer irreparable harm if an injunction is not granted

Relative to the *status quo* in place before the Permanent Guidance and its predecessors, the Permanent Guidance will cause an increase in the sheer number of removable aliens—both with and without criminal convictions—remaining in the States. A larger population of removable aliens in a State will force that State to expend more resources on them. PI Mot., R.4, PageID#92-93. And the increased criminal alien population will inflict the harms discussed above. The States have no avenue of recovering damages from the federal government, which has sovereign immunity. *United States v. City of Detroit*, 329 F.3d 515, 520 (6th Cir. 2003); 5 U.S.C. §702. The States' injuries, for which they cannot recover monetary damages, constitute irreparable harm. *See, e.g.*, *Kentucky v. United States*, 759 F.3d 588, 599–600 (6th Cir. 2014); *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *Kansas Health Care Ass'n, Inc. v. Kansas Dep'ts of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Temple Univ. v. White*, 941 F.2d 201, 214–15 (3d Cir. 1991).

DHS does not seriously contest that any injuries inflicted by the Guidance will be irreparable. It instead argues, again, that the Permanent Guidance will actually *increase* detention and removal of especially dangerous aliens. As explained above, that is false. And the States would suffer irreparable harm even if it were true, as the Permanent Guidance deprioritizes a host of aliens DHS believes are not-so-dangerous but that nonetheless impose financial costs on the States.

III. The remaining factors favor issuance of an injunction.

"As for the remaining parts of the preliminary-injunction analysis, the public-interest factor 'merges' with the substantial-harm factor when the government is the defendant." *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). And here, both support issuance of an injunction, because "the public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (per Sutton, J.) (quotation marks omitted); *see also Nat'l Federation of Indep. Business v. DOL*, No. 21A244, slip op. at 8–9 (U.S. Jan. 13, 2022); *Kentucky*, 2022 WL 43178, at *18.

DHS cannot plausibly deny that an injunction is in the public interest *if* the Permanent Guidance is illegal. To be sure, DHS thinks the policy will have positive effects. "But our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. And DHS's arguments about the likely effects of an injunction are impossible to credit regardless. For example, it insinuates that, without the Permanent Guidance, ICE officers will be confused, presumably leaving risky terrorists to roam the streets while elderly Canadians are targeted for detention. *See* Decker Decl., R.27-30, PageID#592. The Court is not required to exhibit this level of ignorance. Merely acknowledging that Congress created mandatory priorities does not prohibit DHS or individual ICE officers from exercising basic judgment in line with these priorities, as the agency has done for years.

DHS further argues that, instead of issuing an injunction, the Court should remand the rule to the agency without vacating it. *See* Mot. to Dismiss, R.29, PageID#733. The APA does not mention such relief, demanding instead that courts "*shall* … hold unlawful and set aside" unlawful and arbitrary agency action. 5 U.S.C. §706(2) (emphasis added). Notwithstanding this mandatory

language, some courts have found the half-measure may be acceptable to cure factual defects with an otherwise lawful rule. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). They are wrong to do so. *See Checkosky v. SEC*, 23 F.3d 452, 490 (D.C. Cir. 1994) (Randolph, J., separate opinion). In any event, remand without vacatur is proper, if at all, only for otherwise-lawful rules that are just "inadequately supported," and only where the consequences of vacatur would be "quite disruptive." *Allied-Signal*, 988 F.2d at 150–51. But the Permanent Guidance is not simply inadequately supported—it is irreparably illegal, as the foregoing shows, and cannot be fixed with more support. Nor would vacatur be disruptive, as it would simply require the agency to resume its previous enforcement strategy. This case therefore provides no basis to depart from "the ordinary practice [which] is to vacate unlawful agency action." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019).

Moreover, the potential for a remand without vacatur is not a ripe issue until after the merits are conclusively resolved. There is no such thing as a "preliminary remand" or "preliminary vacatur." The States have sought a preliminary injunction, and DHS cannot evade that request by suggesting that a future remand without vacatur might be warranted (and it is not). For now, this Court should enter a preliminary injunction to restore the *status quo ante* during the duration of this case.

Finally, if this Court determines an injunction is appropriate, the Court should not stay its order. The only reason given by DHS for this relief is its hope, without legal basis, that it will be relieved of the injunction later, and its desire to avoid implementing a lawful prioritization scheme in the meantime. Mot. to Dismiss, R.29, PageID#735. But the Permanent Guidance is unlawful, and as implementation statistics continue to be released, the harm will only become more visible.

That DHS seeks to avoid the consequences of enacting an unlawful policy is an insufficient reason to stay the Court's order.

CONCLUSION

The Court should grant the States' request for a preliminary injunction against enforcement of the Permanent Guidance.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Trial Attorney*
MAY MAILMAN (*pro hac vice*)
Deputy Solicitor General
30 East Broad Street, 17th Floor
6l4-466-8980
614-466-5087 fax
benjamin.flowers@ohioattorneygeneral.gov

Counsel for Plaintiff State of Ohio

MARK BRNOVICH
Arizona Attorney General

Anthony R. Napolitano (*pro hac vice*)
Assistant Attorney General
2005 N. Central Ave
Phoenix, AZ 85004-1592
Phone: (602) 542-8958
Anthony.Napolitano@azag.gov
ACL@azag.gov

Counsel for Plaintiff State of Arizona

AUSTIN KNUDSEN
Montana Attorney General

Christian B. Corrigan (*pro hac vice*)
Assistant Solicitor General
215 N Sanders St.
Helena, MT 59601
Phone: (406)-444-2026
Christian.Corrigan@mt.gov

Counsel for Plaintiff State of Montana

CERTIFICATE OF SERVICE

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

/s/ Benjamin Flowers
BENJAMIN FLOWERS (0095284)
Solicitor General