No. 22-58

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.
Petitioners,

v.

STATES OF TEXAS AND LOUISIANA,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, GEORGIA, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

DREW C. ENSIGN
Deputy Solicitor General
Counsel of Record
JAMES K. ROGERS
Senior Litigation Counsel
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Drew.Ensign@azag.gov

Counsel for Arizona
(Additional Counsel Listed in Inside Cover)

STEVE MARSHALL
Alabama Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

CHRISTOPHER M. CARR
Georgia Attorney General

THEODORE E. ROKITA
Indiana Attorney General

DEREK SCHMIDT
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

LYNN FITCH
Mississippi Attorney General

ERIC S. SCHMITT
Missouri Attorney General

AUSTIN KNUDSON
Montana Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

DAVE YOST
Ohio Attorney General

JOHN M. O'CONNOR
Oklahoma Attorney General

ALAN WILSON
South Carolina Attorney General

SEAN D. REYES
Utah Attorney General

JASON MIYARES
Virginia Attorney General

PATRICK MORRISEY
West Virginia Attorney General

BRIDGET HILL
Wyoming Attorney General

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INTEREST OF *AMICI CURIAE*[1]

As this Court has previously observed, States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). In the last 20 months, the volume of unlawful immigration has soared to levels unseen in the United States in decades—and, quite likely, ever. So too have the resulting burdens placed on the States.

But the federal government steadfastly refuses to acknowledge those costs: both in its rulemakings and its Article III standing arguments. DHS's refusal to enforce immigration laws as written—exemplified by the challenged action here, which reads multiple "shall"s as mere "may"s—continues to impose significant costs on the States, including billions of dollars in new expenses relating to law enforcement, education, and healthcare programs. Those harms are exacerbated by DHS's increasingly brazen disrespect for the requirements of our nation's immigration laws and the APA.

As sovereigns within our federal system of dual sovereigns, the States also have an important interest in ensuring that the federal government respects the rule of law. Indeed, States have "quasi-sovereign '*interest[s] in the enforcement of immigration law*.'" *Texas v. Biden*, 40 F.4th 205, 216 n.4 (5th Cir. 2022) (emphasis added). DHS's challenged policies here, however, reflect a corrosive disrespect for both federalism and the harms it is imposing on States.

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[1] Pursuant to Supreme Court Rule 37.6, the Amici States state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. Texas and Louisiana easily established Article III standing under this Court's precedents, particularly *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) and *Massachusetts v. EPA*, 549 U.S. 497 (2007). Indeed, while Respondent States have standing under ordinary standing standards, those standards are doubly relaxed here: first because the States assert procedural injuries and second because they enjoy "special solicitude" in the standing analysis. And the States' harms are both exacerbated and underscored by the role of unfunded federal mandates, which DHS largely ignores.

State standing is particularly important in the immigration context, where this Court has recognized exceptionally broad preemption of state laws. Because States cannot protect themselves by enacting laws of their own, its vital that States at least be able to insist that the federal Executive comply with *federal* law. Otherwise, the States are not separate sovereigns within our federal system but rather recourse-less victims whose interests the Executive can lawlessly harm with impunity.

Texas and Louisiana's harms here include sovereign injury, since the "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part). That sovereign injury renders untenable the Sixth Circuit's reasoning that the States are no different than private parties for standing purposes, upon which DHS places inordinate reliance.

II. The effects of the Final Memorandum's predecessor, the Interim Guidance, provides powerful evidence of the substantial reductions on removals that the Final Memorandum will cause (and has caused). And it further demonstrates the baseless nature of DHS's claim that the Final Memorandum "does not necessarily mean that fewer noncitizens will be removed overall." U.S. Br.8.

The Interim Guidance also demonstrates the untenable and pretextual nature of DHS's "limited resources" reasoning. As the District of Arizona recognized, the enormous decreases in enforcement actions had little, if anything, to do with reduced resources. And DHS's own official confirmed both that (1) the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals being carried out by DHS from before and after February 2021 was DHS's new anti-enforcement priorities, and (2) that he "ha[d] enough resources to effect [his] mission" and it was the new policies, rather than lack of resources, preventing greater numbers of removals. Excerpts of Record, *Arizona v. DHS*, No. 21-16118 (9th Cir. filed Sept. 1, 2021) (hereinafter, "*Arizona* Excerpts") at 102.

III. The harms to Texas and Louisiana (and Amici States) are underscored by the unmitigated disaster that DHS's new policies have produced at our southwestern border. This crisis, which DHS's unlawful actions have caused, highlights the essential role for courts to play in reviewing the legality of DHS's policies. Contrary to DHS's suggestion, the States are not asking federal courts to weigh in on whether DHS's actions are wise or unwise policy, but rather whether they are legal or illegal actions: *i.e.*, the Respondent States are asking for federal courts to

perform their core competency as it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

IV. The weaknesses in DHS's arguments are underscored by DHS's *recent* tactics in other cases. While DHS now claims that vacatur is not even a lawful remedy under the APA, it was perfectly happy in the Public Charge Rule cases not only to acquiesce in vacatur but further to *exploit* the availability of that remedy to rid itself of an unwanted rule without complying with notice-and-comment requirements.

DHS's argument that the APA does not even *authorize* vacatur is also utterly bereft of support in any court of appeals. The circuit courts have been perfectly clear that, under 5 U.S.C. §706, vacatur is not only a permissible remedy, but in fact the *default* one. Indeed, to the extent that the issue is meaningfully debated at all, lower court judges have long doubted whether vacatur can ever lawfully be *withheld*, rather than granted. DHS's contrary arguments rest on little more than a single law review article and bad statutory interpretation.

Similarly, DHS's instant opposition to nationwide relief is undermine by the fact that it quite recently acquiesced in the nationwide scope of a preliminary injunction entered against termination of the Title 42 system of immigration processing that DHS implements.

ARGUMENT

I. Texas And Louisiana Have Article III Standing.

Texas and Louisiana plainly have Article III standing under this Court's precedents, which DHS's arguments contravene.

A. DHS's Arguments Squarely Violate *Massachusetts* and *New York*

As Texas and Louisiana have ably explained, DHS's standing arguments squarely violate the standing precedents of this Court. *See* Tex. Br.12-23. It is particularly useful to compare DHS's instant arguments with this Court's most recent state standing decisions in *Massachusetts* and *New York*, which make plain the flaws in DHS's arguments. In both cases, this Court held that a state had established Article III standing even where the asserted harms were *far* more attenuated than here. This Court could only reverse on standing grounds by overturning those two decisions—which DHS has not even asked this Court to do.

In *New York*, the plaintiff states based their Article III standing on downstream costs resulting from factors that "all … turn[ed] on [the states'] expectation that reinstating a citizenship question will depress the census response rate." 139 S. Ct. at 2565. Federal defendants objected that standing was lacking since "such harm depends on the independent action of third parties choosing to violate their legal duty to respond to the census." *Id.* To no avail.

Even though the plaintiff states' injuries were both downstream and dependent on third parties *violating the law*, this Court *unanimously* concluded that the

states had Article III standing. It was sufficient "that third parties w[ould] likely react in predictable ways" and the states could thus rely upon the "predictable effect of Government action on the decisions of third parties." *Id.* at 2566.

Here there is no need to predict whether Texas and Louisiana would incur injuries because the district court has specifically found that they have already suffered harms, and would continue to suffer them. J.A. 326-28. But *New York*'s "predictable effect" standard is readily satisfied here as well. As the district court found, and past evidence squarely supports (*infra* §II), the "predictable effect" of the Final Memorandum will be to significantly decrease the number of enforcement actions, including removals of deportable noncitizens.

Nor were New York's asserted injuries only mildly downstream, but rather more akin to how New Orleans is downstream of Minneapolis. In *New York*, the plaintiff states asserted that the inclusion of a citizenship ship question on the Census form would lead to those states losing federal funds. *Id.* at 2565. But several things would have to happen first for that to occur. First, individuals would have to refuse to fill out the Census—which is a federal crime. 13 U.S.C. §221. And the criminal actions of third parties often eliminate proximate cause, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-58 (2006), but not standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing[.]").

But even non-completion would cause New York and the other plaintiff states no harm on its own. Second, Congress or federal agencies would need to adopt

funding formulas based on Census data. *New York,* 139 S. Ct. at 2565. And even then, third, New York would likely only be harmed if the non-completion rates were *relatively* higher in New York than the rest of the U.S. If, for example, the challenged question caused completion rates to go down nationally by 10% but only down 5% in New York, New York would likely receive *more* federal funds as a result of its relatively greater population count. But despite being downstream of all of those contingencies and hypothesized third-party law breaking, this Court still *unanimously* held that the State had Article III standing. *New York*, 139 S. Ct. at 2565.

In contrast, the States' harms here are *far* closer to DHS's actions, and the illegal actions are those of the federal government itself, rather relying on those of third parties allegedly resulting from the federal government's legal violations. *New York* all-but compels a conclusion that Texas and Louisiana have standing here.

Similarly, *Massachusetts* is irreconcilable with DHS's arguments. There, Massachusetts had standing premised on EPA's non-regulation of carbon emissions in the transportation sector over the course of a *century*, which would allegedly affect Massachusetts's coastline in unknowable amounts and places, in the teeth of international carbon emissions beyond the scope of any conceivable federal regulation; moreover, the regulations that EPA would issue if Massachusetts won were completely unknown and unknowable (and still not all that clear 15 years later); but *all* of that uncertainty did not preclude Article III standing. 549 U.S. at 521-26.

Massachusetts's injuries were thus not just downstream of innumerable third parties (*e.g.*, drivers' decisions and preferences, foreign nations' and corporations' decisions) and unknown federal regulations, but also of immense amounts of time. But Massachusetts's injuries were nonetheless cognizable because "U.S. motor-vehicle emissions [would] make a *meaningful contribution* to greenhouse gas concentrations." *Id.* at 525 (emphasis added).

The proposition that vacatur of the Final Memorandum would not be a "meaningful contribution" to reducing number of noncitizens unlawfully present in Texas and Louisiana is fanciful and directly contrary to the district court's unchallenged factual findings. It is also impossible to reconcile with the overwhelming evidence from the Final Memorandum's predecessor policy, whose provisions were either substantively equivalent or legally less offensive. *See infra* §II.

There is thus no defensible way to reconcile DHS's standing arguments here with either *New York* or *Massachusetts*. DHS is effectively asking this Court to overturn those cases, but without even attempting to argue that they were wrongly decided or addressing any of the relevant *stare decisis* factors. DHS's standing arguments thus necessarily fail under this Court's unchallenged precedents.

B. Standing Requirements Are Doubly Relaxed Here

Although Texas and Louisiana readily satisfied this Court's ordinary Article III standards for standing, they need not have done so. Instead, those standards are doubly relaxed here under this Court's precedents.

First Relaxation: Procedural Injuries

Standing is relaxed a first time because the States are asserting "procedural right[s] to protect [their] concrete interests." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). The States can thus assert their procedural rights under the APA "'without meeting all the normal standards for redressability and immediacy.'" *Massachusetts*, 549 U.S. at 498 (quoting *Lujan*, 504 U.S. at 572 n.7).

The example provided in *Lujan* is particularly instructive. 504 U.S. at 572 n.7. Just as the dam-adjacent resident need not actually trace his dam-construction-caused harms through the deficient environmental analysis, the Respondent States similarly need not demonstrate that, if DHS conducted notice-and-comment rulemaking and promulgated an APA-compliant rule, the result would be any different. They need only show that the agency *could* reach a different result post-compliance. They have easily done that and more.

Notably, this sharp relaxation as to traceability and redressability stands in stark contrast to "the requirement of injury in fact[, which] is a hard floor of Article III jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). But the States' satisfaction of that "hard floor" is not genuinely disputed here.

DHS appears to deny (at 23) that Texas and Louisiana have any relevant procedural rights as it contends that "the INA creates no procedural right for any third party to challenge immigration-enforcement and related policies." But that ignores that the Final Memorandum is a rule subject to the APA, which very much "creates … procedural rights,"

including for Respondents. In particular, the APA creates rights (1) to notice and comment, 5 U.S.C. §553, (2) to have their reliance interests considered, *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1913 (2020), and (3) not to be subjected to harms based on reasoning that is arbitrary and capricious. 5 U.S.C. §706(2).

Because the States are asserting their procedural rights under the APA, the standing requirements of traceability and redressability are relaxed here.

Second Relaxation: Special Solicitude For States

Standing requirements are relaxed a second time because the States are "entitled to special solicitude" in standing analysis. *Massachusetts*, 549 U.S. at 520; *accord Texas v. United States*, 809 F.3d 134, 159 (5th Cir. 2015) *aff'd by an equally divided court* 579 U.S. 547 (2016) (applying *Massachusetts*'s relaxed "special solicitude" to conclude that the States' "causal connection [wa]s adequate").

Although unwilling to request that *Massachusetts* be overruled, DHS implies (at 24) that it is nonetheless dead letter because this Court did not discuss it in *California v. Texas*, 141 S. Ct. 2104, 2116-2120 (2021), *Trump v. New York*, 141 S. Ct. 530, 534-537 (2020) (per curiam), and *New York*, 139 S. Ct. at 2565.

But in the *New York*, this Court concluded that the State(s) had standing under ordinary standing principles, so there was no need to analyze whether they satisfied the relaxed special-solicitude standard. 139 S. Ct. at 2565-66. And in *California*, this Court concluded that the States were without cognizable

injury at all. 141 S. Ct. at 2120. Presumably no amount of relaxation could fix that, as the bar can be lowered but never reaches the floor itself (which would be elimination, rather than relaxation, of standards). And unlike here, *California* was a purely substantive challenge in any event. 141 S. Ct. at 2112.

In *Trump v. New York*, the plaintiff states' standing theories were "riddled with contingencies and speculation that impede judicial review." 141 S. Ct. at 535. The States' alleged harms thus rested on "'no more than conjecture.'" *Id.* (citation omitted). Not only could special solicitude not help the *Trump* states overcome all of that uncertainty, but there was also little benefit to applying it since those uncertainties would not last long: the parties agreed that "the dispute w[ould] take a more concrete shape once the Secretary delivers his [relevant] report," which was not far off. *Id.* And the plaintiff states' further suffered from insurmountable ripeness problems too, to which the application of special solicitude is unsettled. *Id.* at 535-37.

Here, however, the Final Memorandum has actually gone into effect, and there is hard data as to how it actually operated in practice that readily establishes Texas's and Louisiana's standing. That standing is further supported by the overwhelming evidence from the Final Memorandum's predecessor, which was substantively equivalent, and produced enormous drops in enforcement actions that leave nothing to conjecture. *Infra* §II.

Moreover, DHS does not genuinely deny that Texas and Louisiana have actual injury. Instead, the United States just denigrates those injuries with the DOJ's usual panoply of pejoratives: such harms are

putatively "indirect" (at 7, 13, 15, 23), "incidental" (at 11, 13, 14, 15, 17, 20 n.3), "downstream" (at 35), and "derivative" (at 7, 12). But all of that could have been—and *was*—said in *Massachusetts* and *New York*. And did not carry the day either time.

Because *Massachusetts* and *New York* remain good law, and DHS's half-hearted attempts to distinguish them lack merit, the standing requirements are doubly relaxed here—removing any conceivable doubt that Texas and Louisiana have established standing.

C. DHS Ignores The Role Of Unfunded Federal Mandates

DHS's arguments also ignore the role of unfunded federal mandates, which create an unbroken chain of federal-government-caused injuries. Federal law requires the States to provide educational and healthcare services to immigrants regardless of immigration status. *Plyler v. Doe*, 457 U.S. 202, 230 (1982); 42 C.F.R. §440.255 (c). Thus, when DHS takes actions that necessarily and predictably result in reduced removals, as the district court expressly found, States are necessarily compelled to spend additional moneys under unfunded federal mandates. That easily establishes standing.

Ultimately, the federal government's position boils down to this:

> (1) We can take actions that are alleged to violate the APA and substantive immigration law that will cause substantial decreases in removals of noncitizens unlawfully present in the United States, as reflected in

unchallenged factual findings by the district court.

(2) We further can mandate that the States provide free education and healthcare expenses to those deportable individuals that otherwise would have been removed.

(3) We also can—and do—refuse to compensate the States for these federally-mandated expenditures.

(4) Although we concede the existence of these injuries-in-fact for which the Final Memorandum is a but-for cause, none of this injury is cognizable and the States cannot even question whether those injury-producing actions are lawful.

(5) Because Article III gives us legal impunity to do this (and take innumerable other blatantly unlawful actions).

Thankfully, this is not the law since this Court's precedents, such as *Massachusetts* and *New York*, are directly to the contrary. And the contempt for federalism and the States underlying DHS's distortions of standing precedents amply merits this Court's decisive rejection.

D. State Standing Is Particularly Vital In The Immigration Context

State standing is particularly important in the context of immigration law. As this Court has recognized, States "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397.

But unlike many other fields, the States have far less ability to exercise their traditional sovereign powers to prevent or mitigate these harms. This Court has recognized exceptionally broad preemption of state laws that would otherwise serve to ameliorate the crushing burdens that the federal government's enormous immigration policy failures and legal abdications have inflicted upon the States. *Id.* at 416. Through that broad preemption, the States have been deprived of one of the most obvious ways that they could exercise their residual sovereignty to address the immigration-based harms being imposed upon them: *i.e.*, pass and enforce laws of their own. *See*, *e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) (recognizing that States have "sovereign power" to "create and enforce a legal code").

Because the States cannot enact *state* laws to protect themselves from immigration-based harms, it is all the more essential that the States at least be able to insist that the federal Executive comply with *federal* immigration law. If States can neither pass and enforce their own laws nor require that the federal government comply with federal law, the States will be entirely at the mercy of the whims of the federal Executive.

That is particularly troubling here as this is effectively a *Youngstown* type 3 case: *i.e.*, DHS has "take[n] measures incompatible with the expressed … will of Congress," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)—*i.e.* the "shalls" of 8 U.S.C. §§1226 and 1231. As such, the executive branch's power is supposed to be "at its lowest ebb, for then [it] can rely only upon [the President's] own constitutional powers

minus any constitutional powers of Congress over the matter." *Id.*

But DHS's arguments turn this venerable framework on its head: instead of being at its "lowest ebb," the President's/DHS's power here would essentially be unbounded since the States would be powerless to challenge their actions even though the States have injuries whose factual existence DHS will not even attempt to deny.

The unconstitutionality of President Truman's seizure of the steel mills would have done the owners' little good if their acknowledged proprietary losses did not confer Article III standing to challenge the seizures. The same result should obtain here for Texas's and Louisiana's uncontested pecuniary harms (and also *a fortiori* because they are also suffering sovereign injuries as well, *infra* §I.E.).

E. The States' Harms Here Are Direct And Include Sovereign Injury

Contrary to DHS's suggestion (at 7), the harms are not merely "indirect, derivative effects." Rather, they flow directly from DHS's actions that squarely violate both the APA and immigration law.

For example, as discussed more below, DHS has unlawfully refused to deport noncitizen felons with *final* orders of removal, which has forced Arizona to expend about $4,000 per felon per year to place those convicted criminals on community supervision. *Infra* at 24. If DHS had merely followed Congress's unequivocal, *mandatory* command to remove such aliens with final orders of removal, such costs would never have been incurred. Connecting the dots from DHS's illegal non-removals to the consequently

necessary community supervision costs is straightforward and lacks any intermediate steps that might break the causal chain.

DHS's violations of the APA and immigration laws are thus the but-for and proximate cause of these law-enforcement-based injuries, the harms are readily traceable to DHS's violations, and vacatur of the DHS's illegal policy will directly remedy the State's resulting harms. Put simply, Texas and Louisiana readily established Article III standing under this Court's traditional precedents even if standing requirements were not doubly relaxed here. Which they are. *Supra* §I.B. Nor are law enforcement costs the only proprietary harms here: DHS's unlawful refusals to enforce immigration laws has caused the States to incur additional educational and healthcare-based costs, Tex. Br.9—much of which is the result of unfunded federal mandates. *Supra* §I.C.

The States' abundant proprietary harms are not the only harms at issue, however. DHS's actions inflict sovereign injury too.

The "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part). Although federal preemption has prevented States from enforcing their own laws in this field, that hardly means that the States lack a sovereign interest in ensuring that the federal government takes care to enforce *federal* law in a manner that would simultaneously protect their sovereign rights. Where DHS does so, it vindicates the States' sovereign interest in excluding those individuals without any lawful right to be present within the States' respective

boundaries. Where DHS refuses to do so, however, the States' sovereign injury is exacerbated. And when a State sustains a sovereign injury because of the federal government's refusal to act, it has standing to sue. *Massachusetts*, 549 at 518-22.

That the harms here include sovereign injuries renders unsound the reasoning of the Sixth Circuit in *Arizona v. Biden*, 40 F.4th 375 (6th Cir. 2022). That court denigrated other States' parallel challenge as involving nothing more than "humdrum" proprietary injuries, and reasoned that for such injuries the States were no different "than a person or a business." *Id.* at 386. In its view, the States thus had "no more, and no less" rights than would a private business in the same circumstances. *Id.*

That is untenable. Private businesses, by definition, cannot suffer sovereign injury. And when private corporations suffer proprietary injury, that typically has no consequence beyond diminishing earnings per share. Harmed though those private businesses might be, the impact to the public interest will typically be nil.

In contrast, "States *are not normal litigants* for the purposes of invoking federal jurisdiction," *Massachusetts*, 549 U.S. at 518 (emphasis added). Indeed, when States suffer financial injuries, those harms necessarily divert resources away from other State programs that could otherwise enhance the welfare of their citizens. For example, law-enforcement resources diverted by DHS's unlawful refusals to enforce federal immigration law will predictably reduce resources available to protect the States' citizens from other crimes. And those diversions will lamentably—but quite predictably—

lead to more of the States' citizens becoming victims of crime. Likewise, healthcare and education resources diverted on account of DHS's legal transgressions will not be available to educate and treat the States' lawful residents.

In a world of limited resources—*i.e.*, *ours*—actions that reduce the resources available to States necessarily cause injuries that are far different in character from the loss of profits by private businesses. Such harms are not mere book entries on a company's profit-and-loss reports, but instead cause resource diversions that inexorably harm the States' residents by hindering one of their elected government's ability to serve their needs.

The Sixth Circuit reasoned that the States lacked standing in *Arizona* because their injuries were "'capable of estimate in money.'" *Arizona*, 40 F.4th at 386 (quoting *Massachusetts*, 540 U.S. at 518-19). But not even DHS appears to believe that. Instead, DHS is clear that monetary injuries are perfectly sufficient to establish Article III jurisdiction when States are challenging "how much federal funding it receives." U.S. Br. at 11 (citing *New York*, 139 S. Ct. at 2565).

Money is fungible, however, and there is thus no difference in economic substance between losing federal funds and being forced to expend additional state funds as a result of illegal federal government action. Whether, for example, a State loses federal funds by unlawful federal Executive action that it would have spent on law enforcement or instead is forced to spend state law enforcement funds on actions that would be unnecessary but for unlawful actions by the federal Executive is a distinction without a difference. Either way, the State has less to

spend on law enforcement, and its citizens will necessarily suffer the resulting consequences.

Nor did *New York* actually involve any direct loss of federal funding. Instead, this Court unanimously held the plaintiff states had standing, even though their harms were *multiple steps* downstream of the challenged conduct—including being predicated on the predicted *illegal* actions of third parties. *Supra* at 5-7.

Nor can the Sixth Circuit's "capable of estimate with money" reasoning withstand scrutiny. *Arizona*, 40 F.4th at 386. Notably, the Bay State's alleged injuries in *Massachusetts* were the alleged loss of coastal lands. But land is eminently "capable of estimate with money"—appraisers literally do that every day. True, there is also a sovereign component to Massachusetts' injury in losing lands within its jurisdiction. But so too is there in the States being compelled to retain within their sovereign borders individuals with no lawful right to be there (or anywhere in the U.S.).

On the flipside of the coin, the States' harms here are not so easily measurable in money either. If, for example, the forced diversion of State healthcare resources causes a diagnosis of treatable cancer in one of the States' citizens to be missed, is that resulting avoidable cancer death readily "capable of estimate with money"? The Sixth Circuit certainly thought so, but only by abstracting the injuries and improperly analogizing the States' to mere private companies.

More fundamentally, the Sixth Circuit's States-are-no-different-than-private-companies reasoning would likely be perfectly correct for a unitary state, such as the United Kingdom or New Zealand. There, provincial and local governments really are nothing

more than artificial legal entities chartered by the national government and completely subject to that government's control.

But that is not our system. Instead, "our Constitution establishes a system of *dual sovereignty* between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (emphasis added). For that reason, the States are distinctly *unlike* mere "private businesses," and instead sovereign entities that are not subject to the national government's every whim.

The Sixth Circuit's standing analysis wrongly collapses our system of dual sovereignty into a single sovereign with 50 subjects who lack any legal recourse against it, at least insofar as Article III is concerned. But that is neither our system nor this Court's jurisprudence.

II. The Final Memorandum's Predecessor Inflicted Substantial Harms Upon The States

Much of DHS's arguments is premised on the Final Memorandum lacking any genuine substantive teeth and instead providing a set of mere innocuous suggestions. In DHS's telling, the Final Memorandum "simply provide[s] for DHS to prioritize some individuals over others when allocating its limited enforcement resources." U.S. Br.8.

It is nothing of the sort. In truth, the Final Memorandum prioritizes *non*-enforcement over enforcement—even in the teeth of mandatory duties that divest DHS of the putative discretion that its "Guidelines" purport to exercise.

Similarly, DHS's suggestion (at 8) that the Final Memorandum "does not necessarily mean that fewer noncitizens will be removed overall" is, at best, unserious. Accepting that proposition would require this Court "to exhibit a naiveté from which ordinary citizens are free.'" *New York*, 139 S. Ct. at 2575 (citation omitted)—as well as to reject specific factual findings of the district court in the absence of any argument that they are clearly erroneous. *E.g.* J.A.327-28 ("It has also caused, and continues to cause, increases in the number of criminal aliens and aliens with final orders of removal released into Texas.... At trial, the States proved by a preponderance of the evidence that aliens with criminal convictions *have* reacted in specific ways that harm Texas.").

The Final Memorandum's predecessor, typically known as the "Interim Guidance," makes the substantive bite of the Final Memorandum manifest and removes any conceivable doubt as to the directional arrow on removal numbers, and history is repeating itself here.

The Interim Guidance was functionally identical to the Final Memorandum on review here in most respects. *See* JA.314 ("[T]here has been little practical difference between ICE's detention of aliens with criminal convictions under the February memorandum and under the Final Memorandum."). And the principal differences are likely to produce *even greater* reductions in enforcement actions. For example, unlike the Interim Guidance, aliens that are "priorities are not presumptively subject to enforcement action," and "the Final Memorandum's public safety priority no longer presumptively subjects aliens convicted of aggravated felonies to

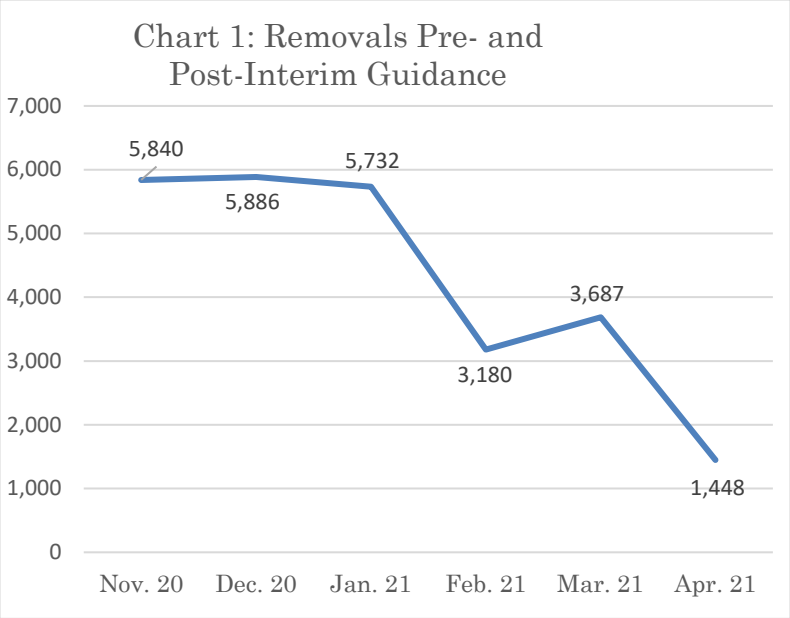
enforcement action, including detention." JA.306-07. The Final Memorandum also creates "an entirely new avenue of redress" for unauthorized aliens to challenge enforcement decisions against them as violating the Final Memorandum, J.A.454-55, which the Interim Guidance lacked.

Arizona's experience provides a useful illustration of the harms that DHS's anti-enforcement policies are inflicting. *Arizona v. DHS*, No. CV-21-186, 2021 WL 2787930, at *6-8 (D. Ariz. June 30, 2021) (same); *accord Louisiana v CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *5-6 (W.D. La. May 20, 2022) (discussing law enforcement, incarceration, and health costs to Arizona caused by increased immigration). The Final Memorandum has caused similar harms. *See* J.A.318-20 (incarceration costs); J.A.320-21 (education cots); J.A. 322-23 (healthcare costs).

The district court in *Arizona* explained, for example, that "of 325 individuals who, *before February 18th* [*i.e.*, before the Interim Guidance], would have been put into immigration detention and removed, *only seven have*"—or roughly a *98%* reduction in removals. *Arizona* Excerpts at 89.

Removals also dropped dramatically under the Interim Guidance (and its predecessor, the 100-day moratorium). Discovery provided in *Arizona* showed the dramatic reduction:

Table 1: Removals Before and After Interim Guidance	
Month	Removals
Nov. 2020	5,840
Dec. 2020	5,886
Jan. 2021	5,732
Feb. 2021	3,180
Mar. 2021	3,687
April 2021	1,448



The harms to the States that flow directly from these reduced removals are readily traceable. The

district court, for example, specifically found that "Arizona annually spends $4,163.60 per individual placed on community supervision [equivalent to federal supervised release] after they are released from state prison." *Arizona*, 2021 WL 2787930, at *7. Nor did the district court have any trouble identifying "individuals on community supervision because ICE lifted detainers against them as a result of their failure to meet ICE's removal priorities under the Interim Guidance." *Id.*; *accord* J.A.318-19 (equivalent findings for Respondent States under Final Memorandum).

Each of those non-removed convicts thus costs Arizona thousands of dollars a year. And the numbers involved are substantial: "over 6% of Arizona's prison population—2,434 noncitizen inmates—currently have ICE detainers lodged against them." *Id.* But under the Final Memorandum, most of those detainers will go unenforced or be dropped entirely.

The district court also had little difficulty in recognizing DHS's "limited resources" rationale for the naked pretext that it was. As Judge Bolton aptly observed, for aliens who "are already in custody of the State, then there's *not a lot of resources that have to be focused on finding those individuals so they can be removed*. All ICE has to do is go pick them up and put them in detention and then work on their removal if it's not a simple matter." *Arizona* Excerpts at 87 (emphasis added). Indeed, for those aliens with final orders of removal that are already in state prisons, it hardly requires substantial resources to locate them: they almost literally have no place to run or hide. If DHS cannot locate detained criminal aliens in their prison cells, it is not for lack of resources.

Nor does removal require much in the way of resources either. As the *Arizona* court observed: "in Arizona, we know that people … *can be removed very quickly* and they literally put them on a bus, drive them to the border, a gate opens on our side and a gate opens on the other side and they are removed afoot is what the removal paperwork says." *Arizona* Excerpts at 85 (emphasis added).

Past is prologue here, and the district court similarly found that the Final Memorandum rests on pretextual resource shortages; indeed, the district court went so far as to hold expressly that DHS "has not acted in good faith." J.A.358-59. DHS has not identified any clear error in that specific factual finding—or acknowledged it at all. It instead apparently regards acting in bad faith as one of its sovereign prerogatives that carries no legal consequence even where that bad faith is uncontested (and apparently uncontestable). That at least clarifies the stakes here, particularly as to standing: DHS asserts the right to injure the States through uncontested bad faith, and the States in its view lack even the right to challenge the legal of its bad-faith actions in federal court.

The district court went on to observe the harmful effects of the Interim Guidance on removals: "[T]hese people are not being removed right now [under the Interim Guidance]. They're being released into our communities. And shouldn't the State of Arizona be rightfully concerned about removal of individuals who are being released after being convicted of state offenses?" *Arizona* Excerpts at 85. Texas and Louisiana are also "rightly concerned" too. *See*, *e.g.*, J.A.238 (detainers that DHS dropped "on account of this new guidance from the Biden Administration"

included a criminal alien convicted of "sexual assault of a child between 14 and 17 years of age").

The testimony of senior ICE official Albert Carter confirmed the direct causal effect between DHS's anti-enforcement policies and the resulting decreases in detainers and removals. He testified specifically that the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals being carried out from before and after February 2021 was the new enforcement priorities (there the Interim Guidance). *Arizona*, 2021 WL 2787930, ECF No. 79-1 at 18-20 (Deposition of Albert Carter at 81:10-84:5; 87:1-89:11).[2]

Director Carter further testified that ICE was releasing detainers for aliens who did not fit Interim Guidance priorities, and when detainers are released, jails have to put felony aliens on supervisory release or just release them into the community. *Id.* at 84:6-14. The same is true of the operation of the Final Memorandum—whose provisions overwhelmingly mirror the Interim Guidance (except to the extent that they are even worse).

Director Carter further confirmed the pretextual nature of the Interim Guidance's "limited resources" rationale: confirming that he "ha[d] enough resources to effect [his] mission," and that he "c[ould]n't think of anything else" besides "[t]he enforcement priorities [that] came into effect roughly around the same time" (*i.e.*, the Interim Guidance) that caused the

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[2] Albert Carter is a career law enforcement officer who served as the Acting ICE Phoenix Filed Office Director from December 2020 to early-May 2021. *Arizona*, 2021 WL 2787930, ECF No. 79-1 at 12-13 (Deposition of Albert Carter at 15:20-24; 18:15-19:19).

substantial decrease in removals. *Id.* at 74:15-20, 76:10-15.

In truth, what is lacking is not resources, but rather desire to enforce federal law as actually written. Indeed, for those aliens with final orders of removal, Congress could not have been clearer: the federal government "*shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added).

Even if the statutory text alone did not itself eliminate any conceivable doubt that this duty was mandatory, *this Court* did just that: "[o]nce an alien is ordered removed, DHS *must* physically remove him from the United States within a 90-day 'removal period.'" *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021) (emphasis added).

But in a remarkable display of lawlessness or legal obtuseness, neither Section 1231's unequivocal text, nor this Court's decision unambiguously construing it, was sufficient to convince DHS of the mandatory nature of its duties under that provision. It appears that only a specific court order will do so, making the district court's vacatur on review here sadly—but also badly—necessary.

More generally, the Interim Guidance imposed direct law enforcement costs and crime-based injuries due to criminal recidivism committed by removable criminal aliens that DHS refuses to remove. *See, e.g.*, *Arizona*, 2021 WL 2787930, ECF No. 15-1 at 6-9. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008),

https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics.

Given those recidivism rates, the release of convicts into the community resulting from non-removals under the Final Memorandum makes it virtually certain that the States will incur additional law enforcement and incarceration costs, as well as direct crime-based losses. And while DHS might prefer to focus on the crime rates committed by migrants generally, the true effect of the Final Memorandum is overwhelmingly focused in reducing removals of a small subset of aliens with felony convictions: those that have committed serious crimes, such as the noncitizen who was convicted of "sexual assault of a child between 14 and 17 years of age," whose detainer was rescinded under the Interim Guidance. *See* J.A.238. Such criminal aliens with felony convictions obtain a disproportionate share of the benefits conferred by the Interim Guidance and Final Memorandum, and likewise cause a disproportionate share of the harms to the States.

III. The Border Is In Crisis.

The challenged Final Memorandum here is part of a constellation of policies that have intentionally hobbled immigration enforcement and led to enormous increases in attempted (and successful) illegal border crossings. This, in turn, has caused States extensive harms through increased law enforcement, education, and health care expenditures. When evaluating those harms in context, it is useful to consider the unprecedented scale of the current border crisis.

DHS has itself admitted that it is "encountering record numbers of noncitizens ... at the border," which

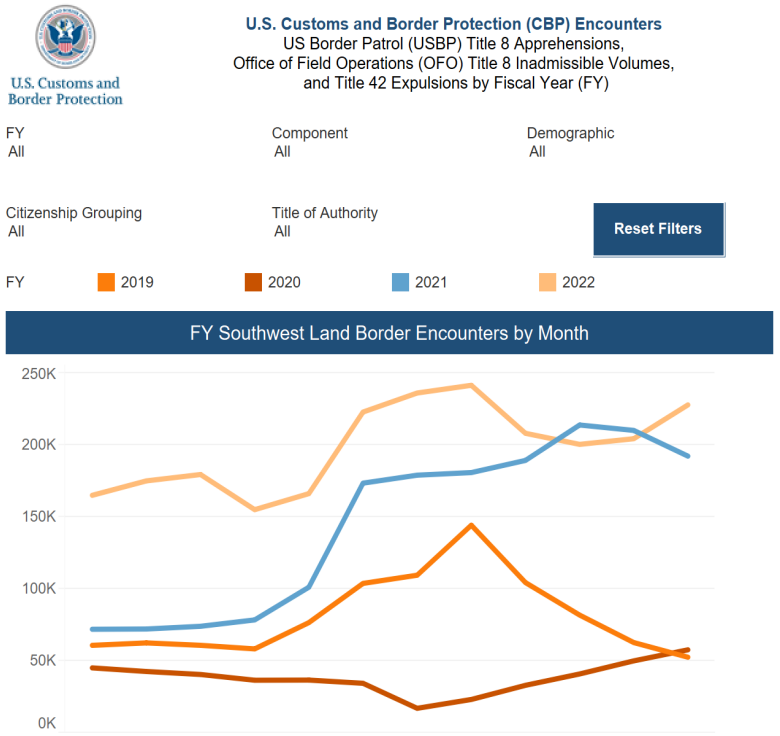
"ha[s] strained DHS operations and caused border facilities to be filled beyond their normal operating capacity." Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Gaynor*, No. 21-cv-100, ECF No. 116 (D.D.C. Aug. 6, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and the corresponding collapse of DHS's operational control of the border. A year ago, DHS admitted that July 2021 had the highest number of monthly encounters in *decades*—and, very likely, *ever* (up to that point). *Id*. at 7 (reporting "the highest monthly encounter number since Fiscal Year 2000"). "Monthly family encounter rates have generally been increasing since April 2020, rising 100-fold from 738 encounters in April 2020 to over 75,000 in July 2021." *Id.* at 9. DHS itself characterized these summer-2021 numbers as "an historic surge" and an "influx." *Id*. at 3, 6.

That "historic surge" has only gotten worse since then. U.S. Border Patrol statistics for migrants illegally crossing the southwestern border show that, in *each month* in 2021, alien encounters were significantly higher than encounters during the same month in previous years. And, so far, monthly encounters for all but two months in 2022 was higher than the unprecedently high numbers of 2021 for the same months (and for those two months the drop was tiny).

The most recent DHS data, from September 2022 (reproduced below), illustrates the unprecedented nature of the crisis. Notably, the number of encounters in May 2022 with illegal border-crossers—239,416—was more than *ten times* the May 2020

numbers, and more than *1.5 times* the corresponding number for May 2019.



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022	164,837	174,845	179,253	154,874	166,010	222,574	235,785	241,136	207,834	200,162	204,087	227,547	2,378,944
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509

Source: U.S. Customs and Border Protection, Southwest Land Border Encounters, available at https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

As the Washington Post explained, "Immigration arrests along the U.S. southern border rose in May *to the highest levels ever recorded*.... CBP made 239,416 arrests along the Mexico border last month.... The agency is on pace to exceed 2 million detentions during fiscal 2022 ... after tallying a record 1.73 million in 2021."[3] That prediction was conservative: the actual number for FY 2022 was nearly 2.4 million—a number never-before-seen in the history of the United States. If such unprecedented harms do not confer Article III standing here, the federal Executive essentially has impunity to inflict wanton harms upon the States no matter what federal statutory law commands.

Border encounters with DHS unfortunately only tell a small part of the story, however. DHS fails to encounter (*i.e.*, apprehend) *most* illegal border-crossers entirely. These so-called "gotaways" comprise about three-fourths of all border crossers. *See Louisiana*, 2022 WL 1604901 at *6 ("[O]nly 27.6% of undocumented persons crossing the southern border were apprehended by DHS personnel."). Thus, the actual number of crossers may be as much as *four times* DHS's reported encounter numbers (*i.e.*, roughly three gotaways for every DHS encounter).

Many of those migrants encountered by DHS are nonetheless permitted entry into the U.S. Although most are *supposed* to be subject to mandatory detention if they are not immediately removed, *see, e.g.*, 8 U.S.C. §1225(b), DHS has also circumvented

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[3] Nick Miroff, *U.S. border arrests rose to record high in May, data shows*, THE WASHINGTON POST, June 16, 2022 (emphasis added), https://www.washingtonpost.com/immigration/2022/06/16/united-states-border-immigration-arrests/.

this mandate through abuse of its parole authority under 8 U.S.C. §1182(d)(5).

As this Court recently observed, parole "authority is not unbounded: DHS may exercise its discretion to parole applicants 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'" *Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022) (quoting 8 U.S.C. §1182(d)(5)(A)). But DHS has instead unlawfully been "releas[ing] undocumented immigrants into the United States *en masse*" under its limited parole authority. *Texas*, 20 F.4th at 996 *rev'd in part* 142 S. Ct. 2528 (2022).

Thus, from April to June 2022, DHS paroled between 54,894 and 91,250 aliens per month. *Texas v. Biden*, No. 21-cv-67, ECF Nos. 139 at 3, 140 at 3, and 143 at 3 (N.D. Tex.). These numbers are escalating rapidly: in March 2022, DHS "only" paroled 36,777. *Id.* ECF No. 136. (In contrast, in the prior administration, the monthly numbers were typically in the double digits.)

In a nutshell: aliens are unlawfully crossing the southwestern border in historically unprecedented numbers. Most—roughly ¾—elude DHS entirely. And for that small portion that does not slip through DHS's fingers entirely, the agency unlawfully paroles many of them into the U.S. rather than detaining them. For the vast majority of migrants unlawfully entering the United States, actual enforcement of U.S. immigration laws by DHS is thus the rare exception, rather than the rule.

IV. DHS's Arguments Are Belied By Its Litigation Conduct Elsewhere

Finally, it is worth noting how irreconcilable many of DHS's instant contentions are with its recent litigation tactics in other cases.

For example, DHS now argues (at 39-44) that vacatur is not a lawful remedy for an APA violation—notwithstanding section 706's command that "review court[s] shall … hold unlawful and set aside agency action" that violates the APA. 5 U.S.C. §706. But in the Public Charge Rule cases, DHS not only acquiesced in a nationwide vacatur, but affirmatively *exploited* it. Indeed, DHS did so "with military precision to effect the removal of the issue from [this Court's] docket and to sidestep notice-and-comment rulemaking" for repealing the unwanted rule. Transcript,[4] *Arizona v. San Francisco*, 142 S. Ct. 1926, 45-46 (2022) (Alito, J.); *see also id.* at 48 ("The real issue to me is the evasion of notice-and-comment. And, I mean, basically, the government bought itself a bunch of time [through the acquiesced-in vacatur] where the rule was not in effect.") (Kagan, J.).

But now that vacatur is no longer particularly useful for dispensing with unwanted rules of the prior administration, DHS has executed a 180-degree *volte face*, again with "military precision." The vacatur that it happily accepted without protest or appeal in the Public Charge Rule cases is now apparently categorically unlawful—not merely disfavored, but completely beyond the power of Article III courts.

If accepted, DHS's position would effectuate a revolution in administrative law. As far back as 1951,

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[4] *Available at* https://bit.ly/3VDDOfZ.

the courts of appeals have recognized that §706 "affirmatively provides for vacation of agency action." *Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r*, 187 F.2d 789, 790 (3d Cir. 1951).

Indeed, the lower courts have long held that vacatur is not only a *permissible remedy* in APA cases, but in fact "the *default remedy* to correct defective agency action." *National Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 501 (D.C. Cir. 2019) (emphasis added).[5] Indeed, debates in the lower courts long centered on whether it is *ever* lawful to *withhold* vacatur—not whether vacatur is itself unlawful in all APA suits. *See*, *e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 490 (D.C. Cir. 1994) (Randolph, J., dissenting) (explaining that remand without vacatur "rests on thin air" and that "the controlling statute—5 U.S.C. §706(2)(A)—flatly prohibits it").

Notably, DHS does not cite a *single* court of appeals that has ever accepted its instant argument. *See* U.S. Br.40-44. The consensus of the lower courts here is thus overwhelming, and this splitless question does not require or warrant this Court's review now. Resolution of that question can and should wait for at least one circuit court to accept DHS's instant argument (should that day ever arrive).

In any event, there is a reason that seemingly every court of appeals has held that vacatur is *at least* an allowable remedy under the APA. Even without looking to Section 706, federal courts have their traditional equitable authority in shaping remedies in APA cases. *See*, *e.g.*, *Monsanto Co. v. Geertson Seed*

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[5] *Accord Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

Farms, 130 S. Ct. 2743, 156-58 (2010) (explaining that traditional equitable tests apply for case asserted under APA); *Hecht Co. v. Bowles*, 321 U.S. 321, 322, 329-30 (1944) (holding that even mandatory language providing that an "injunction … shall be granted" upon finding of a violation was insufficient to effectuate a "departure from traditional equity practice"). And vacatur is one such equitable remedy. *See*, *e.g.*, *Nebraska HHS v. HHS*, 435 F.3d 326, 330 (D.C. Cir. 2006).

Section 706 confirms—and certainly does not displace—district courts' equitable authority to vacate agency action that violates the APA. On its face it commands—not just permits, but *mandates*—that "reviewing court[s] *shall* … set aside agency action" that violates the APA. 5 U.S.C. §706 (emphasis added). That "shall" is the reason why the truly hard question in the lower courts has been whether remand without vacatur is *ever* permissible, rather than whether vacatur is authorized. *Supra* at 34-35.

But whether "shall" in §706 actually means "must" or "may," the one thing it cannot possibly mean is "shall never"—which is DHS's position here. That is simply untenable, both as a matter of text or equitable tradition. *Hecht*, 321 U.S. at 329-30. Moreover, it is difficult to understand what "set aside agency action" could mean *other* than to "vacate" it. It certainly is not the evisceration of federal courts' remedial equitable authority that DHS believes it to be.

DHS also rewrites recent history by contending that the nationwide scope of the vacatur is unlawful. But in a pending, quite-recent 24-state challenge to the attempted termination of CDC's Title 42 system, DHS and CDC refused to dispute that the appropriate

scope of injunctive relief was *nationwide*, rather than being limited to the plaintiff states. *See Louisiana*, 2022 WL 1604901 at *23 (DHS and CDC "do not appear to contest the entry of a nation-wide preliminary injunction").

Indeed, DHS/CDC went so far as to oppose the intervention of a party seeking a more limited injunction, with an eye towards *ensuring* that, if any injunction was affirmed against it, that injunction would continue to be nationwide in scope. *See generally* Brief for Federal Appellants, *Louisiana v. CDC*, No. 22-30303, 2022 WL 3919681 (5th Cir. August 24, 2022) (reiterating opposition, first made in district court on May 12, to attempted intervention by group that sought to argue that "the geographic scope of any relief should not extend nationwide"). And DHS did so just a few short months after the United States expressly told this Court that it has "pretty consistently" "argued that the district courts lack the power to issue nationwide injunctions." Transcript, *Arizona v. San Francisco*, at 71.

"Pretty consistently" apparently does not include one of the other biggest immigration cases in the United States this year, in which the Solicitor General authorized DHS's/CDC's appeal but apparently saw no error or abuse of discretion in the nationwide injunction worth raising. *See generally* Brief for Federal Appellants, *Louisiana v. CDC*, 2022 WL 3010999 (5th Cir. filed July 25, 2022) (acknowledging that district court entered "nationwide relief" and advancing no challenge to nationwide scope). DHS's quite-recent willingness to acquiesce in the nationwide scope of injunctive relief in *Louisiana v. CDC* betrays the United States' apparent lack of conviction in its instant arguments.

CONCLUSION

This Court should hold that Texas and Louisiana have standing to challenge the Final Memorandum and affirm the district court's judgment on the merits.

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Respectfully submitted,

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

DREW C. ENSIGN
Deputy Solicitor General
Counsel of Record
JAMES K. ROGERS
Senior Litigation Counsel
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
Drew.Ensign@azag.gov

Counsel for Arizona

STEVE MARSHALL
Alabama Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

CHRISTOPHER M. CARR
Georgia Attorney General

LYNN FITCH
Mississippi Attorney General

THEODORE E. ROKITA
Indiana Attorney General

DEREK SCHMIDT
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

ERIC S. SCHMITT
Missouri Attorney General

AUSTIN KNUDSON
Montana Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

DAVE YOST
Ohio Attorney General

JOHN M. O'CONNOR
Oklahoma Attorney General

ALAN WILSON
South Carolina Attorney General

SEAN D. REYES
Utah Attorney General

JASON MIYARES
Virginia Attorney General

PATRICK MORRISEY
West Virginia Attorney General

BRIDGET HILL
Wyoming Attorney General