No. 21-40618

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS, STATE OF LOUISIANA,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Victoria Division

OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

COUNSEL LISTED ON INSIDE COVER

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General

JOSEPH S. ST. JOHN
Deputy Solicitor General

Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, Louisiana 70802
Tel.: (225) 326-6766

Counsel for Plaintiff-Appellee State of Louisiana

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Judd.Stone@oag.texas.gov

BENJAMIN D. WILSON
Deputy Solicitor General

KATHRYN M. CHERRY
Assistant Solicitor General

PATRICK K. SWEETEN
Chief of Special Litigation

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Plaintiff-Appellee State of Texas

Certificate of Interested Persons

No. 21-40618

State of Texas, State of Louisiana,
Plaintiffs-Appellees,

v.

United States of America, *et al.*,
Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellees, as governmental parties, need not furnish a certificate of interested persons.

/s/ Judd E. Stone II
Judd E. Stone II

Counsel of Record for Plaintiffs-Appellees

TABLE OF CONTENTS

INTRODUCTION

Defendants contend (at 1) that the district court "entered an intrusive and burdensome preliminary injunction" and asserted "sweeping authority to micromanage the government's enforcement efforts." Nothing could be further from the truth. Instead, the district court—as it made clear in its meticulous 160-page opinion, Add.1-160—simply prohibited the government from applying portions of memoranda issued on January 20 and February 18 (the "January 20 Memorandum" and the "February 18 Memorandum") that are contrary to law, arbitrary and capricious, and procedurally invalid. There is nothing extraordinary about such an injunction. To the extent that there was any doubt, the district court subsequently clarified that it was *not* imposing a mandatory injunction. ECF 90.

At bottom, Defendants would simply prefer not to follow federal law. The Immigration and Nationality Act states that the Attorney General "shall take into custody any alien who" has committed certain crimes. 8 U.S.C. § 1226(c). The Attorney General also "shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2). The January 20 and February 18 Memoranda conflict with these clear requirements by allowing some of the aliens covered by these statutes to be released. This disregard for federal law—and release of aliens who must be detained by statute—predictably harms the States, which are saddled with increased costs related to public safety, healthcare, and education.

Defendants plead poverty to excuse their failure to comply with federal law. But their poverty is self-imposed: Defendants do not deny that they have authority to increase detention capacity to comply with Congress's express requirements.

Add.190-91. But even if they did not, that would not excuse the promulgation of unlawful Memoranda. "Under our system of government, Congress makes laws and the President, acting at times through agencies like [DHS], 'faithfully execute[s]' them." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014) (quoting U.S. Const., art. II, § 3). "The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice." *Id.* Defendants lack authority to ignore Congress's express commands, as they have done.

This Court should deny Defendants' motion to stay pending appeal.

STATEMENT OF FACTS

I. Statutory Framework

The drafters of the INA knew how to make detention of aliens discretionary. For example, Section 1226(a) provides that "an alien may be arrested pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). They also knew how to make detention of aliens mandatory. For example, Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes. *Id.* § 1226(c). And Section 1231(a)(2) provides that "the Attorney General shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2).

Congress passed the current version of the INA "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003). Congress considered evidence that "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their

removal proceedings." *Id.* at 519. As a result, "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. Thus, Congress amended the INA to "requir[e] the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521.

Section 1226(c) requires the Attorney General to take certain criminal aliens into custody. Those aliens may be released only in limited circumstances, upon a statutorily prescribed finding by the Attorney General. 8 U.S.C. § 1226(c)(2).

Section 1226(c) is not the only example. Through other portions of the INA, "Congress explicitly expanded the group of aliens subject to mandatory detention." *Zadvydas v. Davis*, 533 U.S. 678, 698 (2001). For example, for aliens who have been ordered removed, Congress has required that "[d]uring the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 1231(a)(2). "Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under" the specified subsections. *Id.*

II. The January 20 and February 18 Memoranda

Defendants issued two Memoranda that conflict with these mandatory-detention requirements. Defendants began with the January 20 Memorandum. Add.162-65. That Memorandum announced three major changes. *First*, it called for a "Department-wide review of policies and practices concerning immigration enforcement." *Id.* at 163. *Second*, it established "interim enforcement priorities." *Id.* at 163-

64. *Third*, it "[d]irected an immediate pause on removals . . . for 100 days." *Id.* at 164.

This case concerns the second aspect of the January 20 Memorandum, which addresses enforcement related to "National security," "Border security," and "Public safety." *Id.* at 163. This portion of the January 20 Memorandum requires detention of aggravated felons who are determined to be threats to public safety, *id.*, but omits detention of aliens with final removal orders, criminal aliens convicted of drug offenses, and criminal aliens convicted of crimes of moral turpitude. *Contra* 8 U.S.C. §§ 1226(c), 1231(a)(2).

Defendants subsequently issued the February 18 Memorandum providing further "guidance" on these points. Add.168-74. The February 18 Memorandum establishes a two-tier system. *First*, it establishes three "priority categories" nearly identical to those from the January 20 Memorandum. *Id.* at 171-72. Aliens in those categories are "presumed" to be subject to enforcement action. *Second*, the February 18 Memorandum provides that aliens outside the "priority" categories are "presumed" *not* to be subject to enforcement action. *Id.* at 172-73. Agents are required to go through a detailed pre-approval process before taking enforcement action against such aliens. *Id.* at 173-74.

The district court credited evidence that "ICE agents and officers will treat the Memorandum as a list of instructions rather than mere guidance." *Id.* at 138. This finding was amply supported: in only two months, Defendants rescinded 68 detainer requests for inmates held by the Texas Department of Criminal Justice—a dramatic departure from past practice. ECF 19, Ex. C, ¶¶7, 11. These rescinded requests

include aliens convicted of sexually assaulting a child, stalking, evading arrest, forging a government financial instrument, theft, and impersonating a public servant. *Id.* at Ex. C, Ex. 1. During that time, Defendants also rescinded 31 detainers against drug offenders, including offenses relating to possession, manufacture, and delivery of cocaine, methamphetamines, and marijuana. *Id.* These are not simply low-level drug offenders. For example, four of the convictions involved possession of at least fifty pounds of marijuana; not one defendant was convicted of a single offense related to possession of marijuana for personal use. *Id; see also id.* Ex. C ¶ 11. Finally, at least six of the 68 inmates already had final orders of removal issued against them. This does not even consider inmates who must be detained pursuant to Section 1226(c) or Section 1231(a)(2) but who have not had a detainer issued at all.

The situation is similar in Louisiana. The Louisiana Department of Public Safety and Corrections has identified four aliens who should have been issued detainers but were not, including aliens convicted of indecent behavior with juveniles and sexual battery, possession of fentanyl, and second-degree battery. ECF 19, Ex. L.

III. Procedural History

Faced with increased costs and concerns about the safety of their citizens, the States challenged the legality of the Memoranda and moved for a preliminary injunction. Add.19-20. The district court rejected Defendants' challenges to its ability to hear the case (Add.20-103), and concluded that the Memoranda were contrary to

law, arbitrary and capricious, and procedurally invalid. *Id.* at 103-44.[1] The district court further concluded that the States would suffer irreparable harm and that the public interest and equities favored the States. *Id.* at 144-56. The district court entered a preliminary injunction preventing Defendants from enforcing certain portions of the Memoranda. *Id.* at 157-58.

Defendants immediately appealed and sought a stay from the district court. ECF 81, 82. The district court granted the motion in part while clarifying two important points. *First*, the court explained that "Defendants originally misunderstood the reporting requirements" contained in the district court's order granting the preliminary injunction "to be injunctive relief" but "they are not." ECF 90 at 3. Instead, "the Court is using the reporting requirements as a case-management tool to monitor compliance and gather information that would be relevant and helpful for the Court in making a final determination at trial." *Id.*

Second, the district court clarified that it "did not issue a positive preliminary injunction even though the Plaintiffs had requested such relief." *Id.* at 4. And counsel for Defendants confirmed that nothing in the "Preliminary Injunction requires the prosecution, removal, or detention of any person." *Id.* The district court further stayed the preliminary injunction until August 30, 2021. *Id.* at 4. It also allowed Defendants to suggest revisions to the reporting requirements accompanying the

[1] The district court expressly did not rule on the States' claims that the Memoranda violate (1) an agreement between the States and the Department of Homeland Security and (2) the "take care" clause of the Constitution. Add.4.

preliminary injunction and delayed the deadlines for compliance with those requirements until October. ECF 92 at 2-3.

ARGUMENT

Defendants cannot satisfy the "four factors [courts consider] in deciding whether to grant a stay pending appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Texas. v. United States*, 787 F.3d 733, 746-47 (5th Cir. 2015) (cleaned up). "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Id.* (cleaned up).

I. Defendants Are Unlikely to Succeed on the Merits Because They Are Violating Federal Law.

Defendants are not entitled to a stay because they cannot make "a strong showing that [they are] likely to succeed on the merits." *Id.* at 746. This "strong showing" requires the government to demonstrate that the district court abused its discretion by entering an injunction. *Id.* at 747. Legal issues are "reviewed *de novo*," but "findings of fact are reviewed for clear error." *Id.* Defendants ignore this deferential standard of review. *Cf.* Mot. 8.

A. Defendants cannot escape judicial review of their unlawful agency action.

1. Plaintiffs have standing.

Facts offered before the district court demonstrate the States have alleged an injury in fact that is traceable to the challenged Memoranda and redressable by a preliminary injunction. Defendants' argument (at 10) that the States lack an injury in fact is foreclosed by this Court's precedent. *See Texas*, 787 F.3d at 747-51; *see also Texas v. United States*, 809 F.3d 134, 155-56 (5th Cir. 2015).

a. The States presented, and the district court made findings regarding, concrete injuries from the Memoranda through increased detention costs. Add.27. This injury more than satisfies this Court's precedent, which has found standing based on costs Texas would incur issuing more driver's licenses to aliens who would remain in Texas. *Texas*, 787 F.3d at 748. As this Court has held, such "a financial loss generally constitutes an injury" for standing purposes. *Id.* at 748; *see also Texas v. Biden*, No. 21-10806, 2021 WL 3674780, at *4 (5th Cir. Aug. 19, 2021) (explaining "factual findings regarding educational, healthcare, and correctional costs provide equally strong bases for finding cognizable, imminent injury").

Even if that were insufficient, the increased danger to public safety that results from Defendants ignoring Sections 1226(c) and 1231(a)(2) is also a judicially cognizable interest for States. Each State has a quasi-sovereign interest "in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 602 (1982). That includes an interest in protecting its citizens' "well-being—both physical and economic"—from crime caused by Defendants' failure to

detain criminal aliens. *Id.* at 607. Because the States are "asserting rights under federal law rather than attempting to protect [their] citizens from the operation of federal statutes," they can bring such claims against federal defendants. *Texas*, 328 F. Supp. 3d at 697; *see also Texas v. United States*, 86 F. Supp. 3d 591, 625-26 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015).

Finally, the States have standing because they are "owed special solicitude" when they "assert[] a congressionally bestowed procedural right and the government action at issue affects [their] 'quasi-sovereign' interests." *Texas v. United States*, No. 6:21-CV-00003, 2021 WL 2096669, at *20 (S.D. Tex. Feb. 23, 2021) (citing *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007)); *see also Texas*, 809 F.3d at 187; *Texas*, 2021 WL 3674780, at *5-6.

b. Defendants make three arguments to the contrary; none have merit. First, Defendants argue (at 10) that "incidental effects of federal enforcement decisions" are not judicially cognizable. But this Court's precedent establishes the opposite. *See Texas*, 787 F.3d at 751 (rejecting government's argument that "DAPA's incidental consequences are not cognizable injuries"); *Texas*, 2021 WL 3674780, at *4-5 (rejecting similar theory).

Defendants also protest (at 9-10) that their focus on some criminal aliens rather than others will benefit States in the long run. But this Court has explained that "offsetting benefits" where the benefits are not "of the same type" or "arise from the same transaction" "are not properly weighed in evaluating standing . . . ." *Texas*, 787 F.3d at 750. The speculative benefit Defendants cite, a decrease in crime based

on their detention of certain categories of aliens, is "wholly separate" from the costs the States face due to an increase in the number of aliens within their borders. *See id.*

Finally, Defendants argue (at 14) that the States are not within the zone of interest of the INA because "third parties do not have a cognizable interest in the removal of a noncitizen." But as explained above, the States' interests in not spending scarce resources on criminal aliens are well "within the zone of interests of the INA." *Texas*, 809 F.3d at 163. The test is, after all, not "especially demanding." *Id.* at 162.

2. The Memoranda are final agency action.

The States have also established that the Memoranda are final agency action because (1) they "mark the consummation of the agency's decisionmaking process" and are not "of a merely tentative or interlocutory nature," and (2) they contain rules "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.*, 136 S. Ct. 1807, 1813 (2016).

Defendants contend (at 14) that the Memoranda are not final agency action because they do not create "rights or obligations," but they omit that "legal consequences" can show final agency action. This Court has held "that legal consequences flow from" an agency action that "binds its staff." *Texas v. E.E.O.C.*, 933 F.3d 433, 442 (5th Cir. 2019). No one disputes that the Memoranda bind DHS staff. The February 18 Memorandum even imposes additional requirements "[t]o ensure compliance with this guidance." Add.172.

In any event, the district court found the Memoranda do create rights and obligations because they "*require* DHS to enforce the law in a different way than what

Sections 1226(c) and 1231(a)(2) prescribe." Add.58. The Memoranda substitute DHS's obligation to detain aliens specified by Congress with an obligation to identify and detain only some aggravated felons and aliens in other "high priority" groups determined by the agency. *Id.* In addition, the States are now obliged to provide public benefits to aliens who have been released from State custody for certain serious offenses because they are no longer being detained by DHS. *See id.* at 59.

Concomitantly, aliens' rights are significantly broadened, because some who must be detained under Sections 1226(c) and 1231(a)(2) may nevertheless claim that "there is no significant likelihood of removal in the reasonably foreseeable future" and be released. *Id.* at 60; *see Hussein S.M. v. Garland*, No. CV 21-348 (JRT/TNL), 2021 WL 1986125, at *3 (D. Minn. May 18, 2021) (releasing alien whose "removal is unlikely to be imminent" because alien did "not fall within any of [the] priority groups" in the Memoranda). These changes to rights and obligations represent final agency action reviewable under the APA.

3. The Memoranda do not fall within the statutory exceptions to judicial review.

Defendants cannot evade this conclusion by arguing (at 10-13) that the Memoranda fall within the limited exceptions to judicial review created by either the APA or the INA.

a. An agency's refusal to comply with non-discretionary statutory duties is not "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The APA creates a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C.

§ 702). "To give effect to § 706(2)(A) and to honor the presumption of review," the Supreme Court has "read the exception in § 701(a)(2) quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (cleaned up). "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

"[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350 (1984). This Court has held that there is no "clear and convincing evidence" of that intent in the INA. *Texas*, 787 F.3d at 756. Nor does "the government's broad and exclusive authority over immigration policy" bar judicial review. *Id.* at 755. If it did, the "jurisdiction-stripping provisions" in other sections of the INA would be superfluous. *Id.* at 756. Moreover, review of agency action under the INA—including the Memoranda—"is consistent with the protections Congress affords to states that decline to provide benefits to illegal aliens." *Id.* at 755-56; *see also Texas*, 2021 WL 3674780, at *7.

b. Defendants are also wrong (at 12) that Sections 1226(e) and 1231(h) prevent judicial review. *First*, the district court's analysis of Section 1231(h) confirms that Congress meant to prevent individual challenges by aliens who are parties to immigration enforcement proceedings—not efforts by a State to enforce the statute as a whole. Add.59-61; *Texas*, 2021 WL 2096669, at *27. Moreover, the States do not rely

on Section 1231 for a "substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. § 1231(h). Rather, the States rely on the APA for their cause of action, and the "basic presumption of judicial review for one suffering legal wrong because of agency action." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). Even if Section 1231(h) applied to Texas and Louisiana, it would not affect their APA claims. *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001).

Second, the "limitation [of section 1226(e)] applies only to 'discretionary' decisions about the 'application' of § 1226"—and particularly Section 1226(a)—"to particular cases." *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019). The provision "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.

Even if Section 1226(e) could apply to claims by States, it would not apply to the claim here because the structure of Section 1226 confirms that detention decisions under Section 1226(c) are not discretionary. Section 1226(a) states that the Attorney General "may" "arrest[] and detain[] certain aliens." Section 1226(c)(1)-(2) provides that he "shall take into custody" criminal aliens, and "may release" such aliens only under limited circumstances. This distinction between "shall" and "may" is presumed intentional. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

That the Supreme Court has repeatedly described Section 1226(c) as mandatory confirms this reading. *See*, *e.g.*, *Preap*, 139 S. Ct. at 966; *id.* at 969; *Jennings*, 138 S.

Ct. at 846; *Zavydas*, 533 U.S. at 698. Finally, even if Section 1226(e) did apply, it would bar only claims under Section 1226, not Plaintiffs' other claims.[2]

In sum, Plaintiffs have shown that they have standing to challenge the Memoranda, which are final agency action that are presumptively reviewable, and Defendants have not overcome that presumption.

B. The Memoranda violate federal law, are arbitrary and capricious, and are procedurally invalid.

The district court correctly found the Memoranda unlawful. "The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Regents*, 140 S. Ct. at 1905 (cleaned up). It prohibits agency actions that are "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," 5 U.S.C. § 706(2)(A), and requires agencies to engage in "reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (citation omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.*

The January 20 and February 18 Memoranda fail this test at every turn.

1. The Memoranda violate federal law.

The district court correctly concluded that because "'shall' in Sections 1226(c) and 1231(a)(2) means 'must,'" "the Attorney General must detain certain aliens

[2] The government has (at 12) waived arguments that Sections 1259(b)(9) and 1252(g) also prevent judicial review.

subject to those sections." Add.105. The district court was also correct that "both statutes mandate detention of certain aliens at specific points in time" and that "[t]he policy contained in the Memoranda effectively dispenses with these mandates by conferring discretion to the Government to independently decide who will be detained and when—if ever—detention of those individuals might occur." *Id.* "This guidance therefore is wholly contrary to Sections 1226(c) and 1231(a)(2)." *Id.* As discussed, *supra* I.A.3, this conclusion is dictated by the text of those provisions, the structure of the statutory schemes, and Supreme Court precedent.

2. The Memoranda are arbitrary and capricious.

The district court also correctly concluded that the January 20 and February 18 Memoranda are arbitrary and capricious.

a. As an initial matter, Defendants failed to "'articulate a satisfactory explanation for [their] actions, including a rational connection between the facts found and the choice made.'" *Sierra Club v. EPA*, 393 F.3d 649, 664 (5th Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Memoranda "enumerate[] quite a few factors that make the Government's 'mission particularly complex,'" but "fail to establish any rational connection or logical link between any of these factors and the new guidance" because they do "not disclose how or why any of these enumerated factual considerations are connected to the policies the Government ultimately pursued." Add.110.

The district court identified this problem with nearly every factor identified by the Memoranda. *First*, while the February 18 Memorandum mentions "ongoing litigation in various fora," it did not offer "even a brief explanation of how" that

litigation "affected the Government's decisionmaking." Add.110. *Second*, though the "Government's stated responsibility and desire to ensure that eligible aliens may be afforded relief from removal is commendable," the district court is correct that desire "likewise lacks any rational connection to the" Memorandum. *Id.* at 111. *Third*, the district court recognized that "relationships with other sovereign nations 'may place constraints' on the Government's ability to 'execute final orders of removal,'" but "there is no rational link between any of these factual constraints and the reprioritization scheme the Government has chosen to pursue." *Id. Fourth*, the district court concluded that "the Government's written concerns for the health and safety of ICE workers in the midst of the COVID-19 pandemic is not rationally relevant to the new guidance." *Id.* at 112. Because Defendants failed to explain how any of the factors they identified relate to detaining some criminal aliens—but not others—the Memoranda are arbitrary and capricious.

b. If that were not enough, the Memoranda are unlawful for failure to consider other significant factors. "Agency action is lawful only if it rests on a consideration of the relevant factors." *Michigan*, 576 U.S. at 750 (citation and internal quotation marks omitted). Here, this requires the agency to consider (at minimum) that "deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Demore*, 538 U.S. at 518.

The Supreme Court has explained States "bear[] many of the consequences of unlawful immigration" and that "[t]he problems posed to the State by illegal immigration must not be underestimated." *Arizona v. United States*, 567 U.S. 387, 397-98 (2012). It has further confirmed that costs to States are "noteworthy concerns" for

purposes of arbitrary and capricious review and that federal agencies must consider alternatives "within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913-14.

The district court concluded that Defendants failed to consider several of these relevant factors, including (Add.116) "the prospect of recidivism," (Add.122) "State costs and expenses," and (Add.124) "policies that would have retained congressionally mandated detention of criminal aliens and aliens with final removal orders." Because Defendants failed to consider these "important aspect[s] of the problem, *State Farm*, 463 U.S. at 43, the Memoranda are arbitrary and capricious.

c. Defendants seek to rebut the district court's thorough analysis in only two paragraphs (at 16), insisting that the agency satisfied the APA by stating that it had limited resources and was making its decision to maximize its ability to "protect[] national security, border security, and public safety." But this is merely an admission that Defendants failed to explain why the other factors identified in the Memoranda are relevant, and that they did not consider the factors that the district court held they must consider—as required by precedent from this Court and the Supreme Court. This argument does nothing to make a "a strong showing that [they are] likely to succeed on the merits." *Texas*, 787 F.3d at 746; *Texas*, 2021 WL 3674780, at *13.

3. The Memoranda are procedurally invalid.

In addition to these substantive faults, the district court correctly concluded that the Memoranda were procedurally invalid because they did not go through notice-and-comment procedures. Add.127-46. Defendants confront the district court's thorough analysis in only a paragraph, asserting (at 17) that because the Memoranda

reflect "general statements of policy" they are immune from such requirements. This position is foreclosed by precedent too.

Exemptions to notice and comment rulemaking "must be narrowly construed and if a rule is substantive, all notice-and-comment requirements must be adhered to scrupulously." *Texas*, 787 F.3d at 762. This Court "consider[]s two criteria to determine whether a purported policy statement is actually a substantive rule: whether it (1) impose[s] any rights and obligations and (2) genuinely leaves the agency and its decisionmakers free to exercise discretion." *Id.* at 762-63 (cleaned up). The Court is "mindful but suspicious of the agency's own characterization" and focuses "primarily on whether the rule has binding effect on agency discretion or severely restricts it." *Id.* at 763. Binding agency "staff to an analytical method" or withdrawing "agency employees' discretion" to act on "particular grounds" are sufficient to create a substantive rule. *Texas*, 933 F.3d at 443.

As discussed above, the Memoranda affect legal rights and obligations on the part of both aliens and the States. *Supra* at I.A.2. And the district court credited evidence showing that individual agents' discretion under the policy "is so constrained as to be illusory." Add.135-39. Defendants' argument in this Court pointing solely to the face of the Memoranda (at 17) does not show the district court's findings of fact were clearly erroneous.

II. Defendants Cannot Satisfy the Remaining Factors.

Defendants' failure to show a likelihood of success on the merits is sufficient to deny a stay. *Biden, v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021). But they also fail to establish the remaining factors.

A. Self-inflicted inconvenience is not irreparable harm.

To show they will be irreparably harmed without a stay pending appeal, Defendants complain about the requirements of Sections 1226(c) and 1231(a)(2). But those statutes are federal law regardless of this case. Any further injury is self-inflicted and similarly does not justify a stay.

Defendants complain (at 19) that they cannot comply with the INA. But Defendants have significant flexibility to increase the number of aliens they can detain and do not deny that they could increase "current detention capacity" as they done have previously. Add.190. Rather than increase detention capacity, Defendants have d*ecreased* it by canceling contracts with providers. *Id.* at 191. In fiscal year 2019, Defendants detained significantly more individuals than they detain at present, using their authority to repurpose funding. *Id.* at 190.

"[S]elf-inflicted" injuries "do not count," as this Court recently explained when denying a stay in a similar case. *Texas*, 2021 WL 3674780, at *14. Moreover, the district court's negative injunction does not affirmatively order Defendants to detain anyone. Add.157-58; ECF 90 at 4. It simply sets aside unlawful Memoranda that prevented compliance with federal law.

Defendants also bemoan (at 20) confusion that will result because the Secretary is "nearing completion" of "final priorities." But the *Secretary* caused the delay between the Memoranda, the decisions in this case, and the final guidance. Add.56 (representing the Secretary would issue priorities in mid-May, then July, and then August or early September). So that does not count either.

Defendants finally contend (at 21) that the injunction's "reporting requirements" are too onerous. But this ignores concessions that counsel for Defendants made before the district court, ECF 90 at 4, that the district court explained the reporting requirements were not part of the injunction but rather a case management tool, *id.* at 3, and that the district court both modified those requirements and expressed its willingness to consider further modifications upon Defendants' request. ECF 92 at 2-3. Defendants' focus on these purported aspects of the injunction cannot show irreparable harm after the district court has acted to ameliorate the harm.

B. The balance of equities and public interest favor enforcing federal law, not ignoring it.

The balance of the equities and the public interest further weigh against a stay. Defendants have no "interest in the perpetuation of unlawful agency action." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Moreover, "[t]here is always a public interest in prompt execution of removal orders." *Nken*, 556 at 436. Thus, courts often stay injunctions that would have prevented the enforcement of immigration law. *E.g.*, *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020); *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019). But because Defendants are ignoring detention requirements created by federal law, the cases cited by Defendants are inapposite. *E.g.*, *Biden*, 2021 WL 3732667.

CONCLUSION

The Court should deny Defendants' motion.

Respectfully submitted,

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General

JOSEPH S. ST. JOHN
Deputy Solicitor General

Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, Louisiana 70802
Tel.: (225) 326-6766

Counsel for Plaintiff-Appellee State of Louisiana

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

/s/ Judd E. Stone II
JUDD E. STONE II
Solicitor General
Judd.Stone@oag.texas.gov

BENJAMIN D. WILSON
Deputy Solicitor General

KATHRYN M. CHERRY
Assistant Solicitor General

PATRICK K. SWEETEN
Chief of Special Litigation

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Plaintiff-Appellee State of Texas

Certificate of Service

On August 30, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,196 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Judd E. Stone II
Judd E. Stone II