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; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,
Defendants-Appellants.

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

BRIEF FOR APPELLEES STATE OF TEXAS AND STATE OF LOUISIANA

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; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection, In his official capacity; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement, In his official capacity; United States Immigration and Customs Enforcement; Ur M. Jaddou, Director of the U.S. Citizenship and Immigration Services; United States Citizenship and Immigration Services,
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/ Benjamin D. Wilson
Benjamin D. Wilson

Counsel for Plaintiff-Appellee State of Texas and State of Louisiana

Statement Regarding Oral Argument

The States of Texas and Louisiana respectfully request that the Court hold oral argument, which should assist the Court in understanding the issues presented by this appeal.

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Introduction

Federal law requires Appellants to detain certain criminal aliens—including those guilty of crimes of moral turpitude, aggravated felons, serious drug offenders, and terrorists. These aliens must be detained at a specific time—when they are released from criminal custody. Federal law likewise requires Defendants to detain aliens subject to a final order of removal during the removal period. The Supreme Court has repeatedly described these provisions as mandatory. But Appellants would prefer not to comply with these obligations, or even make a good faith attempt. Thus, they promulgated two Memoranda—issued on January 20 and February 18—that purport to relieve them of their statutory duties. At bottom, Appellants would simply prefer not to follow federal law.

This derogation of duty comes with significant costs. Not only does Appellants' failure to detain these aliens create substantial costs for the States, but it also risks the health, welfare, and well-being of the States' citizens by releasing aliens that Congress determined were likely to recidivate. *See Demore v. Kim*, 538 U.S. 510, 518 (2003) (explaining Congress recognized that "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—early half—were arrested multiple times before their deportation proceedings even began").

It is also unlawful. "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). 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) (alteration

in original) (quoting U.S. Const., art. II, § 3). "The power of executing the laws . . . does not include a power to revise clear statutory terms" even if the agency believes those terms "turn out not to work in practice." *Id.*

In addition to violating Congress's straightforward command that certain aliens shall be detained, the Memoranda are also arbitrary and capricious and procedurally invalid. They are arbitrary and capricious both because they fail to explain how many of the factors considered relate to the problem before the agency, and because the agency failed to consider many aspects of the problem—including issues related to recidivism, costs incurred by the States, and whether the agency could have taken action within the ambit of the former policy. The Memoranda are procedurally invalid because they were issued without notice-and-comment procedures as the Administrative Procedure Act and this Court's precedent requires.

Finally, the States will suffer irreparable harm absent an injunction and the balance of equities and public interest weigh in favor of a preliminary injunction. As a result of the Memoranda, the States will suffer financial injuries that cannot be recovered. And there is no public interest in the enforcement of the Memoranda because they are unlawful agency action. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

The district court's issuance of a preliminary injunction should be affirmed.

Statement of Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over the Appellants' appeal from the district court's grant of a preliminary injunction under 28 U.S.C. § 1292.

Issue Presented

Federal law provides that Defendants "may" arrest and detain certain aliens, 8 U.S.C. § 1226(a), but requires that criminal aliens "shall" be "take[n] into custody" by DHS "when the alien is released" from criminal custody. *Id.* § 1226(c). These criminal aliens include those convicted of crimes of moral turpitude, *id.* § 1182(a)(2)(A), aggravated felons, *id.* § 1227(a)(2)(A)(iii), serious drug criminals, *id.* § 1227(a)(2)(B), and terrorists, *id.* § 1182(a)(3)(B). Federal law likewise requires that that Defendants "shall detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2). The Supreme Court has repeatedly described Sections 1226(c) and 1231(a)(2) as mandatory. *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021); *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018); *Demore*, 538 U.S. at 517-18.

The issue presented is: whether the district court correctly entered a preliminary injunction enjoining the enforcement of two Memoranda that ignored Congress's express instruction that certain aliens shall be detained because they are contrary to law, arbitrary and capricious, and procedurally invalid.

Statement of the Case

I. The Statutory Framework

Through the INA, Congress made detention of some 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."[1] 8 U.S.C. § 1226(a). But through other provisions, Congress made detention of other aliens mandatory. For example, Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes. 8 U.S.C. § 1226(c). These criminal aliens include those convicted of crimes of moral turpitude, *id.* § 1182(a)(2)(A), aggravated felons, *id.* § 1227(a)(2)(A)(iii), serious drug criminals, *id.* § 1227(a)(2)(B), and terrorists, *id.* § 1182(a)(3)(B). 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).

Both Section 1226 and Section 1231 also straightforwardly tell the executive when the provisions stating that certain aliens "shall" be detained are triggered. Aliens subject to Section 1231(a)(2) shall be detained "during the removal period" after entry of a final removal order. 8 U.S.C. § 1231(a)(2). And Section 1226(c) mandates detention for a criminal alien "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1)(D). Thus, the phrase "when the alien is released" triggers Appellants' mandatory duty to detain an alien rather than the beginning of removal proceedings under Section 1226(c).

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*, 538 U.S. at 518. Congress considered evidence that "[o]nce released, more

[1] While the statutes at issue generally refer to the duties of "the Attorney General," the obligations and authorities they create now belong to the Secretary and Department of Homeland Security.

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 "require[e] the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521.

Thus, in discussing Section 1226(c), the Supreme Court has repeatedly described it as mandatory. "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings*, 138 S. Ct. at 837 (emphasis in original). Because "Congress has decided" that the Section 1226(a) "procedure is too risky in some instances" it "adopted a special rule for aliens who have committed certain dangerous crimes and those with connections to terrorism." *Nielsen*, 139 S. Ct. at 959. These criminal aliens "must be arrested 'when [they are] released' from custody on criminal charges." *Id.; see id.* at 960 ("Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.).

The same is true for Section 1231(a)(2). Just last term, the Supreme Court confirmed that "[d]uring the removal period, detention is mandatory." *Johnson*, 141 S. Ct. at 2281.

II. The January 20 And February 18 Memoranda

Appellants issued two Memoranda on January 20 and February 18 that straightforwardly conflict with these requirements. Appellants began with the January 20 Memoranda. ROA.1297. *First*, it called for a "Department-wide review of policies

and practices concerning immigration enforcement." ROA.1298. *Second*, it established "interim enforcement priorities." ROA.1298. *Third*, it "[d]irected an immediate pause on removals . . . for 100 days." ROA.1299.

This case concerns the second aspect of the January 20 Memorandum, which addresses enforcement priorities for "National security," "Border security," and "Public safety." ROA.1298-99. 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, or criminal aliens convicted of crimes of moral turpitude. *Contra* 8 U.S.C. § 1226(c), 1231(a)(2).

Appellants subsequently issued the February 18 Memorandum providing further "guidance" on these points. ROA.1300-01. The February 18 Memoranda establishes a two-tier system. *First*, it establishes three "priority categories" nearly identical to those from the January 20 Memorandum. ROA.1301-02. 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. ROA.1302. ICE Agents are required to go through a detailed pre-approval process before taking enforcement action against such aliens. ROA.1302.

The district court made findings of fact reviewable only for clear error that "ICE agents and officers will treat the Memorandum as a list of instructions rather than mere guidance." ROA.1422. This finding was amply supported: in only two months, Appellants rescinded 68 detainer requests for inmates held by the Texas Department

of Criminal Justice—a dramatic departure from past practice. ROA.1307. 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. ROA.1307. A full 31 of those rescinded detainers were against drug offenders, including for offenses relating to possession, manufacture, and delivery of cocaine, methamphetamines, and marijuana. ROA.252-53. 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 was convicted of a single offense related to possession of marijuana for personal use. ROA.251. 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; it only includes those detainers that were issued and then rescinded.

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. ROA.288-89.

III. Prior Proceedings

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. ROA.17-46; ROA.180-224. The district court rejected Appellants' challenges to its ability to hear the case (ROA.1304-88), and concluded that the Memoranda were contrary to law, arbitrary and capricious, and procedurally invalid. ROA.1389-

1428.[2] The district court further concluded that the States would suffer irreparable harm and that the public interest and equities favored the States. ROA.1428-30. The district court entered a preliminary injunction preventing Defendants from enforcing the certain portions of the Memoranda. ROA.1435-1443.

Appellants immediately appealed and sought a stay from the district court. ROA.1446-47; ROA.1449-1458. 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." ROA.1520. Instead, the district court explained that it would "us[e] 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." ROA.1520-21.

Second, the district court clarified that it "did not issue a positive preliminary injunction even though the Plaintiffs had requested such relief." ROA.1521. And counsel for Appellants confirmed that nothing in the "Preliminary Injunction requires the prosecution, removal, or detention of any person." ROA.1521. The district court further stayed its grant of a preliminary injunction until August 30, 2021. ROA.1521. It also allowed Appellants to suggest revisions to the reporting

[2] The district court expressly did not rule on the States' claims that (1) the Memoranda violate an agreement between the States and the Department of Homeland Security and (2) the "take care" clause of the Constitution. ROA.1288.

requirements that accompanied the preliminary injunction and delayed the deadlines for compliance with those requirements until October. ROA.1524-26.

Appellants immediately sought emergency relief from this Court. After hearing oral argument on Appellants' emergency motion for a stay of the district court's injunction, a motions panel of this Court granted in part and denied in part Appellants' motion for a stay pending appeal. *Texas v. United States*, 14 F.4th 332, 334 (5th Cir. 2021). The States subsequently sought rehearing en banc of the motions' panel's decision. On November 30, the En Banc Court granted the States request for rehearing en banc and vacated the motions' panel's opinion. *Texas v. United States*, No. 21-40618, 2021 WL 5578015 (5th Cir. Nov. 30, 2021).

This appeal followed.

Summary of the Argument

The district court's decision to issue a preliminary injunction should be affirmed.

First, the States have standing to challenge the January 20 and February 18 Memoranda. Those Memoranda impose a variety of costs on the States—including costs associated with increased detention of criminal aliens by the States and other law enforcement costs. These costs are injury in fact, fairly traceable to the Memoranda, that are redressable by the preliminary injunction. *Texas v. United States*, 809 F.3d 134, 748 (5th Cir. 2015). The States also suffer costs stemming from the Memoranda related to the provision of public education and healthcare, both of which are independently sufficient to demonstrate standing. If that were not enough, the States have a quasi-sovereign interest "in the well-being of [their] populace." *Alfred L.*

Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 602 (1982). That includes an interest in protecting their citizens' "well-being—both physical and economic"—from crime caused by Defendants' failure to detain criminal aliens. *Id.* at 607. The States are also entitled to special solicitude in the standing analysis, as the district court correctly held.

Appellants numerous objections to judicial review in this case are unavailing. The Memoranda are final agency action because they both "mark the consummation of the agency's decisionmaking process," *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)), and are "action[s] . . . by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

The Memoranda represent the consummation of the agency's decisionmaking process because they were effective immediately and applied to all enforcement actions. The district court had little difficulty concluding that this immediacy and broad application was sufficient. Legal consequences flow from the Memoranda because, as the district court found, ICE agents will view the Memoranda "as a list of instructions rather than mere guidance." ROA.1422. This Court has held that is sufficient to show that legal consequences flow from an action. *Texas v. E.E.O.C.*, 933 F.3d 433, 442 (5th Cir. 2019) (holding "legal consequences flow from" an agency action that "binds its staff.").

The Memoranda also do not represent actions committed to agency discretion by law. "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler*, 470 U.S. at 833. By employing the mandatory "shall"—contraposed against the permissive "may"—in Sections 1226(c) and 1231(a)(2), Congress made clear that these provisions are mandatory. Rather than being committed to agency discretion, the priorities set forth in the Memoranda simply violate federal law. The States are within the zone of interest of the INA and none of the several would-be statutory bars to judicial review are availing for Appellants.

On the merits, the Memoranda are contrary to law, arbitrary and capricious, and procedurally invalid for failing to go through notice-and-comment procedures. The Memoranda are contrary to law because they transgress Congress's express commands in Sections 1226(c) and 1231(a)(2) that certain aliens "shall" be detained.

The Memoranda are arbitrary and capricious both because they failed to explain how what the agency considered was relevant to the problem and because the Memoranda on their face reflect a failure to consider important aspects of the problem.

The Memoranda fail to tie many of the factors considered to the policy ultimately pursued. 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." ROA.1394. The "Government's . . . desire to ensure that eligible aliens may be afforded relief from removal . . . likewise lacks any rational connection to the" Memoranda. ROA.1395. The same is true for considerations related to relationships with other sovereigns and COVID-19.

Second, the Memoranda fail to consider several relevant aspects of the problem. These include the prospect of recidivism among criminal aliens not detained, the States' costs and expenses, and policies that would have retained congressionally mandated detention of criminal aliens and aliens with final removal orders. Failure to consider these "important aspect[s] of the problem" is fatal on arbitrary and capricious review. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Finally, the Memoranda are procedurally invalid because they did not go through notice-and-comment procedures. 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 v. United States*, 787 F.3d 733, 762 (5th Cir. 2015). 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 Memoranda create rights and obligations at least by (1) causing Appellants to abdicate their statutory duties, (2) creating financial obligations for the States, and (3) affecting the rights of some aliens already in detention, as some courts have already recognized. And the Memoranda do not leave the agency and its decisionmakers free to exercise genuine discretion because, as discussed above, the district court found that ICE agents will view the Memoranda as instructions rather than guidance.

The district court also correctly held that the States suffer irreparable harm and the balance of the equities and public interest weigh in favor of the States. The States

suffer irreparable harm because the Memoranda cause them to expend funds that they cannot recover. The States also suffer irreparable harm through damage to their law enforcement and public safety interests. And the public interest and the balance of the equities tip in the States favor because Appellants have no interest in the enforcement of the illegal Memoranda; rather, the public interest and equity is served by compliance with the law. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (recognizing that government officials "do[] not have an interest in the enforcement of an unconstitutional law")

Finally, the scope of the district court's injunctive relief was proper. Appellants had all the notice and opportunity to be heard that the Federal Rules of Civil Procedure require, an injunction (rather than vacatur or remand) was the appropriate remedy, nationwide injunctive relief was appropriate both to maintain the uniformity of the immigration laws and to afford the States full relief, and the district court did not err by imposing reporting requirements as a case management tool and in anticipation of trial.

Standard of Review

This Court "review[s] a preliminary injunction for abuse of discretion." *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015) (quoting *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir.2013)). "[F]indings of fact are subject to a clearly-erroneous standard of review, while conclusions of law are subject to broad review and will be reversed if incorrect." *Id.* (quoting *Sepulvaldo*, 729 F.3d at 417).

ARGUMENT

"The four elements a plaintiff must establish to secure a preliminary injunction are: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Aguire*, 647 F.3d 585, 595 (5th Cir. 2011) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). The district court correctly concluded that the States satisfy this standard and were entitled to a preliminary injunction.

I. The States Have Standing.

Standing requires "an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Texas*, 809 F.3d at 150 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). The States easily meet this standard.

A. The States have suffered injury in fact.

1. The district court made findings amply supported by the record showing that the State suffer injury in fact. The States have injury in fact because they have shown "an invasion of a legally protected interest" that is "concrete," "particularized," and "actual or imminent, not conjectural or hypothetical." *Spokeo v. Robins*, 136 S.Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

The States presented and the district court made findings regarding concrete injuries from the Memoranda from increased detention and other law enforcement costs. ROA.1311-12. 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*, 10 F.4th 538, 546-47(5th Cir. 2021) (explaining "factual findings regarding educational, healthcare, and correctional costs provide equally strong bases for finding cognizable, imminent injury.").

These detention costs manifest in multiple ways, as the district court recognized. First, and most straightforwardly, the district court found that "during just the first two months following the issuance of the January 20 Memorandum, ICE rescinded detainers for 68 aliens housed within Texas's detention facilities" including for "aliens who were convicted of possessing over fifty pounds of a narcotic, manufacturing over 400 grams of methamphetamine, theft, intoxication, assault with a vehicle, and sexual assault of a child." ROA.1306. In addition to retainers that have were issued and have been rescinded, detainers have not been issued at all of other aliens who otherwise would have been issued but for the Memoranda.

Because on average "Texas spends $62.34 per day per inmate in its detention facilities," and may be required to itself detain aliens whose detainers have been rescinded longer than it otherwise would, the costs associated with the rescinded detainers constitute injury in fact. The same is true where Appellants have never issued a detainer at all but would have but for the Memoranda. The States need not provide an exact number or show millions of dollars in harm. "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017).

Second, the district court recognized that the States would suffer increased costs through recidivism of aliens that otherwise would have been detained but will not be under the Memoranda. ROA.1311-12. As the district court explained, Appellants "do[] not seriously refute the Memoranda will result in 'a drop' in immigration enforcement actions." ROA.1307. The Supreme Court has recognized that "deportable criminal aliens who remained in the United States often committed more crimes before being removed." *Demore*, 538 U.S. at 518. Indeed, that is why Congress mandated their detention. *See id.* at 525 n.9 (noting that Congress considered previous criminal convictions "relevant to future dangerousness"). Aliens who would have been detained by Appellants but are not because of the Memoranda increase the States' costs related to law enforcement.

2. Even if that were insufficient (and it is not), the increased danger to public safety that result from Appellants ignoring Sections 1226(c) and 1231(a)(2) is also an interest judicially cognizable for States—giving rise to *parens patriae* standing. ROA.1312-20. Each State has a quasi-sovereign interest "in the well-being of its populace." *Alfred L. Snapp & Son*, 458 U.S. at 602. That includes the States' interests in protecting their citizens' "well-being—both physical and economic"—from harm caused by Appellants' 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 v. United States*, 328 F. Supp. 3d 662, 697 (S.D. Tex. 2018); *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), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (*mem.*).

3. The States also have standing based on increased costs associated with providing a federally mandated education to some aliens who would have been detained but for the Memoranda and through costs associated with providing healthcare to those same aliens. ROA.214-16. In entering its preliminary injunction, the district court did not evaluate these bases for standing. ROA.1312. But they nonetheless provide an alternative basis to affirm the judgment of the district court. When Appellants fail to take custody of aliens set to be released by the Texas Juvenile Justice Department, those who have not yet graduated attend public schools. ROA.288-89. And the States must also expend resources on healthcare costs for aliens who are not detained. ROA.273-76. So long as the States expend some money on aliens who would otherwise have been detained but are not pursuant to the Memoranda, that expenditure also suffices to establish standing. *Czyzewski*, 137 S. Ct. at 983.

B. The States' injury is actual and imminent and fairly traceable to the Memoranda.

The district court also correctly concluded that these injuries were traceable to Appellants' actions in promulgating the Memoranda. ROA.1320-26. First, because the States suffer injury as a direct result of detainers either being rescinded or not issued at all because of the Memoranda, traceability is straightforward. These harms are directly attributable to application of the Memoranda.

Moreover, for harms associated with increased costs related to detention and crime, the district court concluded that "the link between the States' alleged harm

and the Memoranda is virtually unassailable." ROA.1322. This was because "the undisputed evidence demonstrates that the Memoranda are *already* causing a dramatic increase in the volume of criminal aliens released into the public." ROA.1322. Because "the States present[ed] evidence of criminal alien and state felon recidivism through a Texas Sheriff and DOJ's own dataset, Supreme Court precedent citing the congressional record making similar findings as to criminal aliens," and evidence of (limited) federal reimbursement to States that themselves detain criminal aliens, the district court had no trouble concluding that "the federal government has long acknowledged that states like Texas incur financial harm as a direct result of the unlawful behavior of criminal aliens." ROA.1323-24. Because the Memoranda decrease the number of aliens detained, those injuries are traceable to the defendants actions.

This is all that is required.[3] "The causal chain is easy to see." *Texas*, 10 F.4th at 548. Because some criminal aliens that are not detained due to the Memoranda will recidivate, the States will suffer increased costs. *See, e.g.*, *Massachusetts v. E.P.A.*, 549 U.S. 497, 523 (2007) (traceability present where EPA's challenged action might cause individuals to drive less fuel-efficient cars, which in turn may contribute to a rise in sea levels, which may then cause erosion of coastline).

It is not "mere speculation" that at least some criminal aliens not detained because of the Memoranda will recidivate." *Dep't of Com. v. New York*, 139 S. Ct. 2551,

[3] The same is true for costs related to public education and healthcare costs discussed above.

2566 (2019). Rather it is the "predictable effect of government action on the decisions of third parties." *Id.*

C. The States' injury is redressable.

The district court also correctly concluded that the States' injury is redressable. ROA.1326-29. "When 'establishing redressability, [a plaintiff] need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm.'" *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014) (quoting *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 318 (1st Cir.2012)). By enjoining the enforcement of the Memoranda that cause the States' harm, the district court redressed the States' injuries.

D. The States are entitled to special solicitude in the standing analysis.

In addition, the States are entitled to special solicitude in the standing analysis. To be entitled to special solicitude, "(1) the State must have a procedural right to challenge the action in question, and (2) the challenged action must affect one of the State's quasi-sovereign interests." *Texas*, 10 F.4th at 549 (citing *Texas*, 809 F.3d at 151-52).

Both factors are present here. First, just like in the DAPA case, "Texas is asserting a procedural right under the APA to challenge agency action." *Id.* (citing *Texas*, 809 F.3d at 152). This procedural right is sufficient. As the Supreme Court explained in *Massachusetts v. EPA*, "Congress has . . . recognized a . . . procedural right to challenge" agency action that is "arbitrary and capricious." 549 U.S. at 520. "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests,

the Commonwealth is entitled to special solicitude in our standing analysis." *Id.* Thus, the Supreme Court has made clear that challenging an agency action as arbitrary and capricious—as the States do here—can give rise to the relevant procedural right.

II. Appellants' Objections To Judicial Review Are Unavailing.

Appellants raise a bevy of objections to judicial review that the district court correctly rejected, contending (at 30-37) that the Memoranda are not final agency action, that (at 37-40) immigration enforcement decisions are committed to agency discretion by law, that (at 31-32, 34-35) certain statutes bar judicial review, and that (at 36-37) the States do not fall within the INA's zone of interest. Each contention fails.

A. The Memoranda are final agency action.

The APA allows judicial review for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. To be final, agency action first "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett*, 520 U.S. at 177-78. "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). "The Supreme Court has long taken a pragmatic approach to finality, viewing the APA's finality requirement as flexible." *Texas*, 933 F.3d at 441 (cleaned up).

This 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." *Texas*, 809 F.3d at 171 & n.125 (quoting *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (footnote omitted)). "The primary distinction . . . turns on whether an agency intends to bind *itself* to a particular legal position." *Texas*, 933 F.3d at 441 (footnote and internal quotation marks omitted). And "whether an action binds the agency is evident if it either appears on its face to be binding[] or is applied by the agency in a way that indicates it is binding." *Id.* (internal quotation marks omitted).

The district court determined that the States easily meet this standard. As to the first prong of the test, it concluded that "the text of the February 18 Memoranda indicates the Memoranda are the consummation of DHS's decisionmaking process" because it was effective immediately, applied to all ICE programs and offices, and "covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning." ROA.1338. "The immediacy and definite nature of the application of this guidance to *all* enforcement actions and custody decisions" made by Appellants "strongly suggests the agency's decision is final." ROA.1338-39.

This Court has held "that legal consequences flow from" an agency action that "binds its staff." *Texas*, 933 F.3d at 442. And the district court credited evidence presented by the States showing "that ICE agents and officers will treat the Memorandum as a list of instructions rather than mere guidance." ROA.1422. The district court specifically credited a declaration explaining that "[a]s a practical matter, ICE

officers are likely to treat the 'priorities' as categorical rules" and pointed out that the record amply showed that "these 'categorical rules'" had been applied to limit agents' discretion. ROA.1422.

These findings of fact are reviewed under the clearly erroneous standard. *Jindal*, 729 F.3d at 417. The district court straightforwardly concluded that the Memoranda have legal consequences because they binding agency staff—making the Memoranda final agency action. That is all this Court's precedent requires.

Moreover, the district court held the Memoranda 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." ROA.1342. The Memoranda substitute DHS's obligation to detain aliens specified by Congress with an obligation to identify and detain only 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 Appellants. ROA.1343.

Concomitantly, aliens' rights are significantly broadened, because some who must be detained under §§ 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. ROA.1344; *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" set out in the Memoranda). These changes to rights and

obligations represent final agency action, making the Memoranda reviewable under the INA.

B. An agency's refusal to comply with non-discretionary duties is not committed to agency discretion by law.

1. The district court correctly concluded that detention of aliens under Sections 1226(c) and 1231(a)(2) is not committed to agency discretion by law. "Establishing unreviewability is a 'heavy burden' and 'where substantial doubt about congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *Texas*, 809 F.3d at 164 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

The APA contains a "basic presumption of judicial review." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) "To honor the presumption of review," the Supreme Court has read section 701(a)(2) "quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion." *Id.* (cleaned up). These limited categories include: (1) a "decision not to institute enforcement proceedings," *id.* (citing *Heckler* 470 U.S. at 831-32); (2) "a decision not to reconsider a final action," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987)); (3) "a decision . . . to terminate an employee in the interests of national security," *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citing *Webster v. Doe*, 486 U.S. 592, 599-601 (1988)); and (4) "[t]he allocation of funds from a lump-sum appropriation." *Id.*

In particular, "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler*, 470 U.S. at 833. Even if the statute "leave[s] much to the Secretary's discretion," it "do[es] not leave his discretion unbounded." *Dep't of Com.*, 139 S. Ct. at 2568. This is not a "case in which there is no law to apply." *Id.* at 2569 (internal quotation marks omitted). To the contrary, Sections 1226(c) and 1231(a)(2) provide clear law for the agency to apply—it is simply that Appellants have chosen to disregard that law.

Both Section 1226(c) and 1231(a)(2) create mandatory requirements to detain the aliens they cover. "The first sign that the statute impose[s] an obligation is its mandatory language: 'shall.'" *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). "'Unlike the word "may," which implies discretion, the word "shall" usually connotes a requirement.'" *Id.* (quoting *Kingdomware Techs,. Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)). Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes "when the alien is released" from criminal custody. 8 U.S.C. § 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).

The "mandatory nature" of Sections 1226(c) and 1231(a)(2) are "underscore[d] by "adjacent provisions." *Maine Cmty. Health Options*, 140 S. Ct. at 1320. "'When', as is the case here, Congress 'distinguishes between "may" and "shall," it is generally clear that 'shall' imposes a mandatory duty.'" *Id.* (quoting *Kingdomware*, 136 S. Ct. at 1977). The INA generally—and Sections 1226 and 1231 specifically—use both "may" and "shall," demonstrating that Congress distinguished between duties that

the executive must undertake and duties that the executive has discretion whether to undertake. Congress required the executive to detain the aliens covered by Sections 1226(c) and 1231(a)(2) by using the mandatory "shall."

The structure of Section 1226 aptly illustrates this principle. Section 1226(a) provides discretion, stating that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The Attorney General "may" either "continue to detain the arrested alien" or "may release the alien" on "bond" or "conditional parole." *Id.* § 1226(a)(1)-(2). In turn, Section 1226(b) provides that "at any time" that "bond or parole" "may" be "revoke[d]." *Id.* § 1226(b).

Section 1226(c) limits that discretion for some aliens by providing that "[t]he Attorney General shall take into custody" criminal aliens "when the alien is released." *Id.* § 1226(c)(1). The "Attorney General may release" these criminal aliens only under narrowly proscribed circumstances, and upon a determination that "the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." *Id.* § 1226(c)(2).

Were Section 1226(c) discretionary rather than mandatory, it would be a provision that simply does no work. Section 1226(a) already provides discretion to detain aliens—and so a separate discretionary power to detain criminal aliens would be superfluous. Moreover, were Section 1226(c)(1) discretionary, there would be no need for Section 1226(c)(2) to narrowly proscribe the circumstances where criminal aliens may be released from custody; under this erroneous reading, there is no requirement that they be detained in the first instance, and so no need to circumscribe release.

This Court's precedent requires avoiding such superfluity. *United States v. Lauderdale Cty., Miss.*, 914 F.3d 960, 966 (5th Cir. 2019) (internal quotation marks omitted). Reading Sections 1226(c) and 1231(a)(2) to require detention avoids the problems a contrary reading demands.

This interpretation is confirmed by Supreme Court precedent that has repeatedly described Section 1226(c) and Section 1232(a)(2) as mandatory. "Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings*, 138 S. Ct. at 837 (emphasis in original). Because "Congress has decided" that the Section 1226(a) "procedure is too risky in some instances" it "adopted a special rule for aliens who have committed certain dangerous crimes and those with connections to terrorism." *Nielsen*, 139 S. Ct. at 959. These criminal aliens "must be arrested 'when [they are] released' from custody on criminal charges." *Id.; see id.* at 960 ("Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.). And as the Supreme Court has further explained, Congress adopted these special procedures because of the serious harms that criminal aliens may cause if not detained, including their high rates of recidivism. *Demore*, 538 U.S. at 518-20.

The same is true for Section 1232(a)(2). Just last term, the Supreme Court confirmed "[d]uring the removal period, detention is mandatory." *Johnson*, 141 S. Ct. at 2281.

2. Appellants contend (at 32-33) that that the Supreme Court's decision in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) disturbs this straightforward reading

of the statutory scheme. It does not. First, *Castle Rock* merely explained that "a true mandate . . . would require some stronger indication from the Colorado Legislature than" the use of the mandatory "shall." *Id.* at 761. With Section 1226, Congress created a reticulated scheme of both discretionary and mandatory detention. If Section 1226(c) does not create a mandatory duty in the context of that scheme—by requiring Defendants "shall detain" criminal aliens when released from criminal custody while separately allowing that other may aliens be detained—it is difficult to imagine how Congress could create a mandatory detention scheme at all.

Second, *Castle Rock* repeatedly refers to the problem of arrest in "cases in which the offender is not present to be arrested." *Id.* at 762; *see also id.* ("[I]t is unclear how the mandatory-arrest paradigm applies to cases in which the offender is not present to be arrested."). But Congress specifically avoided that problem here, by mandating criminal aliens be detained "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1)(D).

Appellants also contend (at 35) that they have an antecedent authority regarding "whether to initiate or continue to pursue removal proceedings" at all.[4] But once again, this simply ignores the text of the relevant provisions. Section 1226(c) mandates detention not when Appellants have reached a decision on whether to institute removal proceedings, but "when the alien is released" from criminal custody. 8

[4] This argument cannot hold for Section 1231(a)(2) because it applies to aliens in "the removal period. 8 U.S.C. § 1231(a)(2). An alien is in the removal period only after "an alien is ordered removed." *Id.* at § 1231(a)(1)(A). The decision to institute removal proceedings has already been made once Section 1231(a)(2) is implicated.

U.S.C. § 1226(c)(1)(D). The phrase "when the alien is released" triggers Appellants' mandatory duty to detain an alien under Section 1226(c), not the beginning of removal proceedings.

This interpretation is confirmed by Supreme Court precedent. In *Nielson*, the Court explained that Section 1226(c) "provides that the Secretary 'shall take' into custody an 'alien' having certain characteristics and that the Secretary must do this 'when the alien is released' from criminal custody." 139 S. Ct. at 964. As the Supreme Court plainly stated: "The Secretary *must* arrest those aliens guilty of the predicate offense[s]" described in Section 1226(c). *Id.* at 966 (emphasis in original).

Both Justice Kavanaugh's concurrence and the dissent in *Nielson* agreed, at least on that much. *See id.* at 973 ("Congress has in fact mandated detention of certain noncitizens who have been in criminal custody and who, upon their release, would pose a danger to the community or risk of flight.") (Kavanaugh, J., concurring); *id.* at 976 (Section 1226(c) "requires the Secretary of Homeland Security to take those aliens into custody 'when . . . released' from prison and to hold them. . . .") (Breyer, J., dissenting).

There is nothing odd about Section 1226(c) requiring Appellants to detain criminal aliens when they are released from criminal custody. After all, "Congress enacted mandatory detention precisely out of concern that . . . 'deportable criminal aliens who are not detained' might 'continue to engage in crime [or] fail to appear for their removal hearings.'" *Id.* at 968 (quoting *Demore*, 538 U.S. at 513). And it made this decision against a backdrop of high recidivism rates among such aliens. *Demore*, 538 U.S. at 518-20.

Thus, in addition to ensuring that criminal aliens attend deportation proceedings, the Supreme Court has recognized that Congress was concerned with simply decreasing crime. *Id.* And whether or not Section 1226(c) itself requires Defendants to institute removal proceedings, their obligation to detain criminal aliens may well inform their decisions concerning whether to institute deportation proceedings in the first instance. Appellants are wrong to insist that whatever generalized discretion they may have to institute removal proceedings allows them to ignore Congress's express command.

C. The States are in the INA's zone of interest.

The district court correctly determined that the States are within the INA's zone of interest. ROA.1384-87. The "test is not meant to be especially demanding and is applied in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable." *Texas*, 809 F.3d at 162 (cleaned up). "The Supreme Court has always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff, and [this Court] does not require any indication of congressional purpose to benefit the would-be plaintiff." *Id.* (cleaned up). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (internal quotation marks omitted).

The States satisfy this standard. As this Court has explained, "'[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States,' which 'bear[] many of the consequences of unlawful immigration.'" *Id.*

at 163 (quoting *Arizona v. United States*, 567 U.S. 387, 397 (2012)). The States interest in not spending scarce resources on criminal aliens that must be detained by statute is well within the zone of interest of the INA. *See id.* ("The interests the states seek to protect fall within the zone of interests of the INA.").

D. No other statutory bar prevents judicial review of the Memoranda.

Appellants suggest that several other statues bar judicial review. But none are availing.

First, (at 32) Appellants point to 8 U.S.C. § 1252(g). That statute says that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). But the States are not bringing a "cause or claim by or on behalf of any alien." And the Supreme Court has previously rejected this argument. *Regents*, 140 S. Ct. at 1907 ("We have previously rejected as 'implausible' the Government's suggestion that § 1252(g) covers 'all claims arising from deportation proceedings' or imposes 'a general jurisdictional limitation.'") (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)).

Second, (at 35) Appellants point to 8 U.S.C. § 1226(e). The Supreme Court has rejected this contention as well. 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. *Supra* II.B; *see also*, *e.g.*, *Preap*, 139 S. Ct. at 966; *id.* at 969; *Jennings*, 138 S. Ct. at 846; *Zadvydas v. Davis*, 533 U.S. 678, 698 (2001). And failing all of that, even if Section 1226(e) did apply, it would bar only claims under Section 1226, but not the other claims in this suit.

Third, Appellants point (at 35) to 8 U.S.C. § 1231(h). The district court's analysis confirms that Congress meant to prevent individual challenges by aliens who are parties to immigration enforcement proceedings,—not efforts by State to enforce the statute as a whole. ROA.1333-35; *Texas v. United States*, No. 6:21-CV-00003, 2021 WL 2096669, at *27 (S.D. Tex. Feb. 23, 2021). Moreover, the States do not rely on Section 1321 for "substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. § 1321(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." *Regents*, 140 S. Ct. at 1905 (cleaned up). And again, even if Section 1231(h) applied to the States, it would not affect their APA claims. *Zadvydas*, 533 U.S. at 687-88.

III. The States Are Likely To Succeed On The Merits Because Appellants Are Violating Federal Law.

A. The Memoranda are contrary to federal law.

The district court correctly concluded that the Memoranda are contrary to federal law for many of the same reasons discussed *supra* II.B. ROA.1389. Sections 1226(c) and 1231(a)(2) require detention of certain aliens, and the Memoranda ignore those requirements in favor of a different detention scheme that omits many of the aliens covered by statute. By ignoring Congress's instructions in favor of another scheme, the Memoranda are contrary to federal law. *Supra* II.B.

B. The Memoranda are arbitrary and capricious.

The district court correctly concluded that the Memoranda are arbitrary and capricious. ROA.1389-1411. "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), which implies a host of procedural obligations. Courts must ensure "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made."' *State Farm*, 463 U.S. at 43. It must consider the reliance interests of those affected by the regulation, *Regents*, 140 S. Ct. at 1913-15, and must consider less-disruptive policies in the light of those interests. *Id.* The agency may not offer pretextual or *post hoc* explanations of its actions. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

Moreover, as this Court recently explained, arbitrary and capricious review is "not toothless," but "[i]n fact, after *Regents*, it has serious bite." *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130, 1136 (5th Cir. 2021) (quoting *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019)).

1. The Memoranda are arbitrary and capricious because they fail to explain how the factors considered relate to the policy pursued.

The district court recognized that "the February 18 Memorandum . . . enumerates quite a few factors that make the Government's mission particularly complex in this field," but explained that "the Memorandum itself does not directly state whether these factors were considered while the Government was actually formulating the guidance in question." ROA.1394. (internal quotation marks omitted). Nonetheless, "assuming they were considered" the district court determined the January 20 and February 18 Memoranda were arbitrary and capricious because they do "not disclose how or why any of these enumerated factual considerations are connected to the policies the Government ultimately pursued" and so "fail[ed] to establish any rational connection or logical link between these factors and the new guidance." ROA.1394.[5]

The district court enumerated numerous errors in the Memoranda in this regard. *First*, while the February 18 Memorandum mentions "ongoing litigation in

[5] Because Appellants declined to produce an administrative record for the district court's review, the district court properly "limit[ed] its inquiry to the findings, conclusions, and explanations provided in the February 18 Memorandum for its review." ROA.1392.

various fora," it did not offer "even a brief explanation of how" that litigation "affected the Government's decisionmaking." ROA.1394. *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" Memoranda. ROA.1395.

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." ROA.1395. *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." ROA.1396. 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.

This lack of fit between the factors that the agency considered and the policy that it adopted is fatal under arbitrary and capricious review. After all, as the district court explained "agency action must be based on non-arbitrary, relevant factors." *Judulang v. Holder*, 565 U.S. 42, 55 (2011).

2. The Memoranda are arbitrary and capricious because they fail to consider relevant factors.

"Agency action is lawful only if it rests on a consideration of the relevant factors." *Michigan v. EPA*, 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 district court concluded that Appellants failed to consider several relevant factors, including (1) "the prospect of recidivism," (ROA.1401-02), (2) "State costs and expenses," (ROA.1404), and "policies that would have retained the Congressionally mandated detention of criminal aliens and aliens with final removal orders." (ROA.1406-07). 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.[6]

As the district court concluded, the Memoranda fail to consider risks of recidivism among criminal aliens who are not detained. Recidivism was a major concern animating Congress's decision to make detention of this class of aliens mandatory, and Congress recognized criminal aliens pose serious recidivism problems. *See Demore*, 538 U.S. at 518–19. Yet the Memoranda do not adequately consider recidivism—because an alien who is merely "a threat to public safety" does not satisfy their criteria. ROA.1401. Instead, aliens must both pose a threat to public safety and have had prior aggravated felony or criminal gang conviction to qualify for detention. ROA.1401. And the Memoranda do not explain why aliens who are only threats to

[6] Insofar as Appellants have presented arguments not contained on the face of the Memoranda, the district court correctly disregarded them. ROA.1400. "*Post hoc* rationalizations offered by the Government's counsel are irrelevant." *Univ. of Texas M.D. Anderson Cancer Ctr. v. Dep't of Health & Hum. Servs.*, 985 F.3d 472, 475 (5th Cir. 2021) (citing *State Farm*, 463 U.S. at 50).

public safety are (or might be) at a lower risk of recidivism, or even analyze the question. This failure to consider recidivism ignores an important aspect of the problem, *State Farm*, 463 U.S. at 43, one Congress expressly sought to address in passing Section 1226(c). ROA.1402-1403.

Second, the Memoranda fail to consider costs to the States. The Supreme Court has recognized that 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*, 567 U.S. at 397, 398. Nonetheless, the Memoranda do not consider these costs, though they were required to do so. *See Regents*, 140 S. Ct. at 1914 (describing lost revenue for "States and local governments" as one of several "certainly noteworthy concerns" that DHS failed to consider, rendering the rescission of DACA arbitrary and capricious). The Memoranda are arbitrary and capricious for failing to consider this important aspect of the problem. *Michigan*, 135 S. Ct. at 2706 ("[A]gency action is lawful only if it rests on a consideration of the relevant factors.").

Third, the Memoranda fail to consider policies that are "within the ambit of the existing" policy. ROA.1408; *Regents*, 140 S. Ct. at 1913. Because the Supreme Court's opinion in *Regents* requires such consideration, the Memoranda are arbitrary and capricious. As the district court recognized, the Memoranda do not "consider[] the limited policies the States proposed" because they "fail[] to discuss how a policy enabling the Government to detain all criminal aliens subject to congressional mandates compares with the opted-for guidelines" and "d[o] not even state whether the

new guidelines even considered *any* other policy." ROA.1409. That is likewise arbitrary and capricious.

C. The Memoranda are procedurally invalid because they did not go through notice-and-comment procedures.

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. ROA.1412-28.

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 substantive rule. *Texas*, 933 F.3d at 443.

As discussed, *supra* II.A, and as detailed by the district court, ROA.1411-28, these criteria are met here. First, the district court concluded that the Memoranda affect rights and obligations in at least three ways. ROA.1417. The Memoranda "command[] DHS to abdicate its obligations under Section 1226(c) and 1231(a)(2) to detain *all* aliens within the ambit of those provisions and that the detention occur

at or *for* a specified time." ROA.1417. "[T]he Memoranda also create financial obligations for [the States] that would not have existed but for the Memoranda. ROA.1417. Finally, the Memoranda "affect the rights of some aliens already in detention" because at least some courts have held based on the Memoranda that an alien's removal is "unlikely to be imminent." ROA.1417-18.

The district court also correctly concluded that the Memoranda do not leave the agency and its decisionmakers free to exercise genuine discretion. *Texas*, 787 F.3d at 762-63. As the district court concluded, the Memoranda set forth a detailed scheme where some enforcement actions are presumed to be valid but many other enforcement actions are presumed not to be valid.

The Memoranda require significant process before detaining an alien—or initiating any other proceeding—not within one of the presumptively valid categories. "[T]he February 18 Memorandum stipulates that '[*a*]*ny* civil immigration enforcement or removal actions that do not meet the [specified] criteria for presumed priority cases *will require* preapproval from the [Field Office Director (FOD)] or [Special Agent in Charge (SAC)]. ROA.1419. What's more, again as the district court recounted, "the Memorandum details a mandatory process for receiving" the necessary "preapproval." ROA.1420. In sum, "an agent or officer seeking to detain an alien or conduct other enforcement actions is required to consider certain factors in determining whether to conduct the proposed enforcement action, put this justification in writing, work this written justification through a chain of command and, most importantly, wait for approval to conduct what would otherwise be a routine enforcement action." ROA.1420.

The district court also credited an affidavit from a longtime ICE official that explained "as a practical matter, ICE officers are likely to treat the 'priorities' as categorical rules rather than presumptions to be rebutted on a case-by-case basis." ROA.1422. In view of the face of the Memoranda and other evidence, the district court properly concluded that "[t]he Memoranda are not general statements of policy because they have a binding effect insofar as they presently affect certain rights and obligations and do not afford sufficient discretion to DHS and its decisionmakers." ROA.1428.

That conclusion comfortably fits within this Court's precedent, which explains that binding agency "staff to an analytical method" or withdrawing "agency employees' discretion" to act on "particular grounds" are sufficient to create substantive rule. *Texas*, 933 F.3d at 443. Here, as a practical matter, the Memoranda bind agency staff to the rules they set out. Thus, at they were required to go through notice-and-comment procedures.

IV. The States Would Suffer Irreparable Harm Absent A Preliminary Injunction.

"To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, the States need only show that the injury "cannot be undone through monetary remedies." *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (quoting *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)).

The district court principally concluded that the States would suffer irreparable harm because they will incur financial costs that are unrecoverable. ROA.1429. That is, the States will be forced to incur additional costs because the Appellants are not complying with their statutory duties—both by continuing to hold aliens who had retainers rescinded and by bearing the costs of criminal aliens who recidivate but who would have been retained but for the Memoranda. ROA.1429. Because the States cannot recover the funds they expend from Appellants, this harm is irreparable.

The district court also concluded that, as the Supreme Court has recognized, "law enforcement and public safety interests" can constitute irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012); ROA.1430. Because the district court recognized that the States suffered parens patriae injury, *supra* I.A., it also concluded that these "law enforcement and public-safety interests underlie the States' *parens patriae* injuries" and constitute irreparable harm.

V. The Balance Of The Equities And The Public Interest Favor The States.

The district court also concluded that the balance of the equities and the public interest favors the States. ROA.1431-35. Because Appellants were the non-moving party below, these two elements "merge." *Nken v. Holder*, 556 U.S. 418, 435, (2009); *Texas*, 809 F.3d 187.

Appellants have no legitimate interest in the promulgation and enforcement of the Memoranda because they are unlawful. *See Newby*, 838 F.3d at 1 ("There is generally no public interest in the perpetuation of unlawful agency action."); *Walsh*, 733 F.3d at 488 (recognizing that government officials "do[] not have an interest in the

enforcement of an unconstitutional law"). As this Court has explained, "the public is served when the law is followed." *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013). Because the Memoranda are unlawful for all of the reasons described above, the balance of the equities and the public interest favors the States.

VI. The Relief Entered By the District Court Was Not Overbroad.

Contrary to Appellants' assertions (at 48-54), the district court properly entered injunctive relief that was not overbroad. ROA.1435-43. Appellants make four arguments that the district court erred in entering relief. But none are availing.

First, Appellants contend (at 48-49) that the district court's injunction was overbroad because it prohibits the government from relying on the Memoranda when making decisions regarding aliens who are not within the scope of Sections 1226(c) and 1231(a)(2). But this ignores that the district court held that the Memoranda were both arbitrary and capricious and procedurally invalid. Whether or not the district court's injunction goes beyond the scope of aliens subject to Sections 1226(c) and 1231(a)(2), these holdings plainly support the district court's grant of relief.

Second, (at 49-50) Appellants contend remand rather than vacatur or an injunction is the appropriate remedy. Appellants argue that remand was appropriate because there is "a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389-90 (5th Cir. 2021). But once again this ignores the district court's opinion. Even assuming Appellants could make this showing for the States' arbitrary and capricious claims (which they cannot) it is difficult to see how

they could remedy other problems with the Memoranda that the district court identified. Appellants could not, for example, remedy that the Memoranda violate Sections1226(c) and 1231(a)(2) by providing new or more detailed reasoning. Nor could they remedy the failure to promulgate the Memoranda through notice-and-comment procedures without fully engaging in that process. So the district court's injunctive relief survives this objection as well.

Third, Appellants suggest (at 50-52) that the district court should not have issued a nationwide injunction. The district court recognized that this Court has held that a district court, "under 'appropriate circumstances,' has authority 'to issue a nationwide injunction.'" ROA.1435-36 (citing *Texas*, 809 F.3d at 188). This Court has explained that "Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*" *Texas*, 809 F.3d at 187-88. It has also explained that a geographically limited injunction is inappropriate when "there is a substantial likelihood that a geographically-limited injunction would be ineffective because [the] beneficiaries" of the Memoranda "would be free to move among the states." *Id.* at 188.

The district court found that both conditions were satisfied here. ROA.1436-37. First it concluded that "the Memoranda affect national immigration policy, which was designed to be uniform." ROA.1436. And second, the district court concluded that "a geographically limited injunction is insufficient to protect the States from irreparable harm because aliens not detained pursuant to the Memoranda in other states are able to move to Texas and Louisiana." ROA.1436. Importantly, the district court expressly relied on evidence presented by the States showing that "more than

50,000 noncitizens moved into Texas from another U.S. State in 2019." ROA.1436. So the district court's conclusions were not without support, as Appellants (at 51) claim.

Even if that were not correct, the district court's preliminary injunction "does not provide relief beyond the parties to the case." *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring). To the extent it "advantage[s] nonparties, that benefit [is] merely incidental" to providing complete relief to Texas and Louisiana. *Id.* Thus, this Court's injunction is not "universal" in the relevant sense because it does not go beyond the "group having something to do with [Plaintiffs'] claimed injury." *DHS v. New York*, 140 S. Ct. 599, 599 (2020) (Gorsuch, J, concurring in the grant of stay).

Fourth, (at 52-54) Appellants contend that they should be relieved of the district court's reporting requirements both because they were improper under Fed. R. Civ. P. 65(a) and because they are unduly burdensome.

As an initial matter, Federal Rule of Civil Procedure 65(a)(1) provides that "[t]he court may issue a preliminary injunction only on notice to the adverse party." Fed. R. Civ. P. 65(a)(1). Appellants had that notice. And in any event, their reliance on *Harris Cnty. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 325 (5th Cir. 1999) is misplaced. It explains that Rule 65's "notice requirement necessarily requires that the party opposing the preliminary injunction has the opportunity to be heard and to present evidence." 177 F.3d at 325. That too occurred here.

Moreover, as the district court later clarified, Appellants "originally misunderstood the reporting requirements to be injunctive relief" but "[t]hey are not."

ROA.1520. Rather, as the district court explained at its hearing on Appellants motion to stay the injunction there, "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." ROA.1520-21. The district court separately granted Appellants' request "to file additional proposed substantive revisions to the reporting requirements after conferring with Plaintiffs." ROA.1526. Thus, in addition to being a case management tool rather than a portion of the injunction, Appellants had every opportunity to ask the district court itself to modify the scope of the reporting requirements. Appellants' contentions with respect to these requirements support reversal on neither the facts nor the law.

Conclusion

The Court should affirm the district court's grant of a preliminary injunction.

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

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

/s/ Benjamin D. Wilson
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 December 13, 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/ Benjamin D. Wilson
Benjamin D. Wilson

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,521 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/ Benjamin D. Wilson
Benjamin D. Wilson