**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION**

STATE OF TEXAS; STATE OF LOUISIANA, *Plaintiffs*, v. The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendants*.	Civ. Action No. 6:21-cv-16

PLAINTIFFS' MOTION TO POSTPONE THE EFFECTIVE DATE OF AGENCY ACTION OR, IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

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INTRODUCTION

To protect the American people, Congress mandated that the executive branch detain dangerous criminal aliens. Section 1226(c) of the Immigration and Nationality Act ("INA") requires Defendants to detain aliens convicted of serious drug offenses, aggravated felonies, and crimes of moral turpitude. And Section 1231(a)(2) requires Defendants to detain aliens with final orders of removal.

But Defendants have disregarded these non-discretionary duties. Instead, they have issued two unlawful agency memoranda, which, as implemented, prohibit federal officials from following federal law. Applying these memoranda instead of congressional commands, Defendants have refused to take custody of criminal aliens set to be released from criminal custody. And on September 30, Defendants issued a third memorandum that is to supplant those two on November 29.

Plaintiffs ask the Court to postpone the effective date of that third memorandum (the "September 30 Memorandum"). "The APA authorizes reviewing courts to stay agency action pending judicial review. 5 U.S.C. § 705. Motions to stay agency action pursuant to these provisions are reviewed under the same standards used to evaluate requests for interim injunctive relief." *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010) (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n,* 772 F.2d 972, 974 (D.C.Cir.1985)); s*ee also Texas v. U.S. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (granting stay of agency action under 5 U.S.C. § 705 and applying preliminary injunction factors).

This Court has preliminarily enjoined the enforcement of the two earlier memoranda. ECF No. 79. Defendants appealed and a motions panel of the Fifth Circuit granted a partial stay of the injunction pending appeal. *Texas v. United States*, 14 F.4th 332 (5th Cir. 2021). Plaintiffs have petitioned for *en banc* review of the stay order. On October 20, 2021, the Fifth Circuit called for a response from Defendants to be filed by November 1.

The motions panel concluded that the "injunction will go into effect to the extent it prevents DHS and ICE officials from relying on the memos to refuse to detain aliens described in 1226(c)(1) against whom detainers have been lodged or aliens who fall under section 1231(a)(1)(A) because they have been ordered removed." *Texas*, 14 F.4th at 341. But it stayed the injunction "pending appeal in all other respects." *Id.*

The motions panel believed that "[t]he central merits issue" presented in this case "is whether Congress has interfered with immigration officials' traditional discretion to decide when to remove someone." *Id.* at 336. It then held that the agency actions set out in the memoranda (or at least some of them) are committed to agency discretion by law, *id.* at 338–40, that the Defendants' discretion as to whom to initiate removal proceedings against necessarily limits who must be detained for purposes of 1226(c), *id.* at 336–38, and that the term "shall" in the context of immigration enforcement does not mean "must." *Id.* at 337–40. The panel did not address this Court's conclusion that the memoranda are arbitrary and capricious and substantively unlawful for failure to go through notice-and-comment procedures.

But "a motions panel decision is not binding precedent." *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988); *see also Tex. Democratic Party v. Abbott*, 978 F.3d 168, 176 (5th Cir. 2020) (citing *Northshore*). Such a decision, like *dicta* or any other nonbinding authority, "is persuasive authority only, and is not binding." *Soc'y of Separationists v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991).

Nor does the law-of-the-case doctrine impose the motion panel's reasoning on this Court's future rulings. The Fifth Circuit recently explained that the law of the case does not apply to a motions panel's decision. *See In re Deepwater Horizon*, 723 F. App'x 247, 249–50 (5th Cir. 2018) (per curiam). District courts recognize this distinction as well. *See, e.g.*, *S. Pac. Trans. Co. v. Voluntary Purchasing Grps., Inc.*, 246 B.R. 532, 536–37 (E.D. Tex. 2000) (applying law of the case, explaining that it was "significant" that the issue was addressed "by the same merits panel that heard oral argument, rather than being reviewed by an interim motions panel").

Of course, this Court is bound by a motions panel's *mandate*. But "the mandate rule requires a district court on remand to effect [the appellate court's] mandate and to do nothing else." *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548, 551 (5th Cir. 2018). As such, this Court must follow the motions panel's express commands—the preliminary injunction against the two memoranda is partially stayed—but is not otherwise bound by its reasoning as applied to different stages of litigation or against other agency actions because its decision is not "binding precedent." *Northshore*, 835 F.2d at 583.

The reasoning in this Court's order preliminarily enjoining Defendants from

relying on the two memoranda, ECF No. 79, was in no way overruled by the motions panel and it should continue to apply when evaluating on the merits the first two memoranda and for the instant motion seeking to postpone the effective date of the September 30 Memorandum on the same grounds.

But Defendants are not even complying with the portions of the injunction the motions panel left in place. They are "refus[ing] to detain aliens described in 1226(c)(1) against whom detainers have been lodged [and to detain] aliens who fall under section 1231(a)(1)(A) because they have been ordered removed." *Texas*, 14 F.4th at 341. Since the motions panel's ruling on September 15, Defendants have rescinded 18 detainers already lodged against criminal aliens in Texas custody, Ex. C at Ex. 1, and rescinded detainers lodged against 21 aliens with final orders of removal. Ex. C ¶ 15.

This violation of statutory mandates is permitted to continue under the terms of the September 30 Memorandum, which boasts of the "broad discretion to decide who should be subject to . . . the execution of removal orders," Ex. X at 2, contradicting even the motions panel's reasoning that section 1231(a)(1)(A) requires that they detain "aliens [who] have been ordered removed." The September 30 Memorandum's application of "mitigating factors that militate in favor of declining enforcement action" to "apprehension of aliens" and reference to "[t]he gravity of an apprehension and removal on a noncitizen's life," Ex. X at 3, 1, 4, ensures that Defendants will continue to rescind already-issued detainers unless this Court acts.

Because Defendants' failure to detain dangerous criminal aliens will irreparably injure Texas and Louisiana, Plaintiffs respectfully request that the Court postpone the effective date of the new guidance or, in the alternative, preliminarily enjoin it.

BACKGROUND

I. Detention of Aliens under the INA

Sometimes, the INA makes detention of aliens discretionary. Section 1226(a), for example, states 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) (emphasis added).

But other times, the INA makes detention of aliens mandatory. Section 1226(c), for example, states that "[t]he Attorney General *shall* take into custody any alien who" has committed certain criminal offenses. *See id.* § 1226(c)(1) (emphasis added). And Section 1231(a)(2) further states that "the Attorney General *shall* detain" an alien with a final order of removal "[d]uring the removal period." *Id.* § 1231(a)(2) (emphasis added).

When U.S. Immigration and Customs Enforcement ("ICE") takes custody of an alien who is already in the custody of another law enforcement agency, it does so through a detainer request. *See* Ex. D ¶¶ 17, 19; 8 C.F.R. § 287.7. "An ICE detainer is a written request to state or local officials, asking them (1) to notify [DHS] as soon as practicable before an alien is released and (2) to maintain custody of the alien for up to 48 hours beyond the preexisting release date so that DHS may assume custody." *City of El Cenizo v. Texas*, 890 F.3d 164, 174 (5th Cir. 2018).

Detainer requests serve multiple important purposes. First, "[d]etainers

reduce potential risks to ERO officers, removable aliens, and the general public by allowing arrests to be made in secure custodial settings as opposed to at-large in communities." Ex. N at 17; *see* Ex. D ¶ 17. Second, "[t]he use of detainers also conserves scarce government resources." Ex. N at 17; *see* Ex. D ¶ 17. Third, detainers "allow[] ICE ERO to assume custody of criminal aliens before they have an opportunity to reoffend." Ex. N at 17; *see* Ex. D ¶ 17. ICE uses these detainer requests regardless of whether it is exercising discretion under Section 1226(a) or following the statutory commands in Sections 1226(c) and 1231(a)(2).

Congress mandated detention of criminal aliens "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, 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.* And there was "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." *Id.* at 519. One problem was that "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.*

The solution was "requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability." *Id.* at 521 (citing Section 1226). In addition to mandates, Congress provided "budget enhancements" that allowed for "increased detention to ensure removal." INS &

EOIR, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312-01, 10,323 (Mar. 6, 1997).

II. Defendants' Issuance of the Challenged Memoranda

Defendants have now issued *three* memoranda undermining that statutory solution. These memoranda—issued without notice and comment or sufficient rationales—are preventing Defendants from complying with their statutory duty to detain certain aliens.

On January 20, 2021, the acting Secretary of DHS issued a memorandum announcing three changes. *See* Ex. A ("January 20 Memorandum"). First, it called for a "Department-wide review of policies and practices concerning immigration enforcement." *Id.* at 2. Second, it established "interim enforcement priorities." *Id.* at 2–3. Third, it "direct[ed] an immediate pause on removals . . . for 100 days." *Id.* at 3.

This case concerns the second aspect of the January 20 Memorandum—the interim enforcement priorities and how their implementation has led Defendants to cease detaining dangerous criminal aliens. Those interim enforcement priorities apply to supposedly "discretionary enforcement decisions, including deciding . . . whom to detain or release." Ex. A at 2.

The January 20 Memorandum limits DHS's interim enforcement priorities as follows:

> 1. **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.

> 2. **Border security.** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.
>
> 3. **Public safety.** Individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an "aggravated felony," as that term is defined in section 101(a) (43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety.

Id. at 3.

DHS did not prioritize detention of criminal aliens with final orders of removal, criminal aliens convicted of drug offenses, or criminal aliens convicted of crimes of moral turpitude.

On February 18, 2021, the Acting Director of ICE issued a memorandum providing further "guidance" on the interim enforcement priorities. *See* Ex. B ("February 18 Memorandum"). Like the January 20 Memorandum, the February 18 Memorandum addresses "whether to issue a detainer" and "whether to assume custody of a noncitizen subject to a previously issued detainer." Ex. B at 3.

On its face, 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 4–5. Aliens in those categories are "presumed" to be proper subjects of enforcement action.

Second, the February 18 Memorandum provides that aliens outside the "priority" categories are "presumed" *not* to be proper subjects of enforcement action. *Id.* at 3–4. According to the February 18 Memorandum, "[a] civil enforcement or

removal action that does not meet the above criteria for presumed priority cases will require preapproval" from supervisors. *Id.* at 5. Thus, honoring any existing detainer or imposing a new one on a "non-priority" alien will require preapproval from the Field Office Director or Special Agent in Charge. That hurdle would, as a practical matter, prevent ICE officers from detaining criminal aliens who do not fit within the February 18 Memorandum's three categories. *See* Ex. D ¶ 36.

The guidance at issue in this motion—the September 30 Memorandum—is titled "Guidelines for the Enforcement of Civil Immigration Law." *See* Ex. X.

The September 30 Memorandum stated that it would take effect on November 29, 2021 and would on that date rescind the January 20 Memorandum and the February 18 Memorandum. *See* Ex. X at 6. However, the September 30 Memorandum mandates that DHS and its component agencies implement several requirements "before the effective date of this guidance." *Id.* at 6.

The September 30 Memorandum identified the same three priority enforcement categories found in the previous memoranda: threats to national security, threats to public safety, and threats to border security. *Id.* at 3–4. However, the September 30 Memorandum modified the February 18 Memorandum so that even priority category aliens cannot presumptively be subjected to enforcement actions.

The September 30 Memorandum places enormous practical burdens before any enforcement action can be undertaken, even in the priority category of threats to public safety:

> The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our

> personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue.

Id. at 4. The same is true for the priority category of border security:

> There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

Id.

As with the previous two memoranda, the September 30 Memorandum omits (1) criminal aliens convicted of drug offenses; (2) criminal aliens convicted of crimes of moral turpitude; and (3) criminal aliens with final orders of removal as priorities. But it further omits an enforcement priority that the prior memoranda included: criminal aliens convicted of aggravated felonies. Each of these categories is specifically addressed in the Immigration and Nationality Act, including 8 U.S.C. § 1226(c)(1), which states, "The Attorney General shall take into custody" aliens who meet specified conditions, including criminal aliens convicted of drug offenses, crimes involving moral turpitude, and aggravated felonies.

The September 30 Memorandum makes clear that a conviction for an aggravated felony would not in itself justify taking an enforcement action against an alien. It states that "[w]hether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories." Ex. X at 3. Instead,

"mitigating factors that militate in favor of declining enforcement action" would have to be considered. The September 30 Memorandum lists the following examples of such factors:

> • advanced or tender age;
>
> • lengthy presence in the United States;
>
> • a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;
>
> • status as a victim of crime or victim, witness, or party in legal proceedings;
>
> • the impact of removal on family in the United States, such as loss of provider or caregiver;
>
> • whether the noncitizen may be eligible for humanitarian protection or other immigration relief;
>
> • military or other public service of the noncitizen or their immediate family;
>
> • time since an offense and evidence of rehabilitation;
>
> • conviction was vacated or expunged.

Id. at 3–4. But even these "are not exhaustive." *Id.* at 4.

The September 30 Memorandum also lists a smaller number of aggravating factors that could be considered in cases where an alien was convicted of a crime:

> • the gravity of the offense of conviction and the sentence imposed;
>
> • the nature and degree of harm caused by the criminal offense;
>
> • the sophistication of the criminal offense;

- use or threatened use of a firearm or dangerous weapon;
- a serious prior criminal record.

Id. at 3.

The September 30 Memorandum provides that "[t]he civil immigration enforcement guidance does not compel an action to be taken or not taken. Instead, the guidance leaves the exercise of prosecutorial discretion to the judgment of our personnel." *Id.* at 5. However, as a practical matter, requiring an intensive investigation—discovering and evaluating a large number of factors not easily accessible through a quick database search—before undertaking routine enforcement action is not feasible to an officer on the street facing a need to make an immediate decision. Ex. D ¶ 46.

This practical effect on enforcement by field officers is magnified by the September 30 Memorandum's onerous review processes which ultimately involve the chain-of-command in every routine enforcement action:

> To ensure the quality and integrity of our civil immigration enforcement actions, and to achieve consistency in the application of our judgments, the following measures are to be taken before the effective date of this guidance:
>
> A. <u>Training</u> Extensive training materials and a continuous training program should be put in place to ensure the successful application of this guidance.
>
> B. <u>Process for Reviewing Effective Implementation</u> A review process should be put in place to ensure the rigorous review of our personnel's enforcement decisions throughout the first ninety (90) days of implementation of this guidance. The review process should seek to achieve quality and consistency in decision-making across the entire agency and the Department. It should therefore involve the relevant chains of command. Longer-term

> review processes should be put in place following the initial 90-day period, drawing on the lessons learned. Assessment of implementation of this guidance should be continuous.
>
> C. Data Collection We will need to collect detailed, precise, and comprehensive data as to every aspect of the enforcement actions we take pursuant to this guidance, both to ensure the quality and integrity of our work and to achieve accountability for it. Please work with the offices of the Chief Information Officer; Strategy, Policy, and Plans; Science and Technology; Civil Rights and Civil Liberties; and Privacy to determine the data that should be collected, the mechanisms to collect it, and how and to what extent it can be made public.
>
> D. Case Review Process We will work to establish a fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken. Discretion to determine the disposition of the case will remain exclusively with the Department.

Ex. X at 6. Combined with the following provision, the September 30 Memorandum sends a clear message to field agents that they do not actually have discretion to fully enforce the immigration laws and their actions will be scrutinized after the fact, leading to reduced enforcement on the front end:

> We will meet regularly to review the data, discuss the results to date, and assess whether we are achieving our goals effectively. Our assessment will be informed by feedback we receive from our law enforcement, community, and other partners. This guidance is Department-wide. Agency leaders as to whom this guidance is relevant to their operations will implement this guidance accordingly.

Id. at 7; Ex. D ¶ 47.

The September 30 Memorandum will thus have a similar effect as the February 18 Memorandum's preapproval process. The September 30 Memorandum effectively instructs ICE enforcement staff to forgo undertaking a large number of

enforcement actions and will result in a significant increase in released detainers and the failure to issue detainers. Ex. D ¶ 48.

The September 30 Memorandum does not prioritize detention of criminal aliens with final orders of removal, criminal aliens convicted of drug offenses, criminal aliens convicted of crimes of moral turpitude, or criminal aliens convicted of aggravated felonies.

III. Defendants' Failure to Detain Criminal Aliens

The January 20 and February 18 Memoranda preclude Defendants from taking custody of criminal aliens, even when detention is required by statute. In a sharp departure from past practice, Defendants have already rescinded detainer requests for numerous criminal aliens. And the September 30 Memorandum will have the same effect.

During the Biden Administration, ICE has rescinded detainer requests for 150 inmates held by the Texas Department of Criminal Justice ("TDCJ") based on new "enforcement priorities." Ex. C ¶¶ 8, 12; *see id.* ¶ 17. That is a dramatic departure from prior agency practice. During the same period one year earlier, ICE did not issue any detainer rescissions to TDCJ based on similar enforcement priorities. *See id.* ¶ 11, Ex. 2.

Defendants have also rescinded detainer requests for a host of violent and dangerous criminal aliens. ICE refused to take custody of a criminal alien who sexually assaulted a child and another convicted of stalking. *See* Ex. C, Ex. 1 (Chawda). ICE has even refused to detain eighteen aliens convicted of some form of evading arrest—despite the obvious risk they will not show up for immigration

proceedings. *See id.* ICE also rescinded detainers on aliens convicted of tampering with or forging a government financial instrument, theft, and impersonating a public servant. *See id.* (Sanchez-Velazquez, Cabreracruz, Mainsah, and Sanchez). At least 21 of those 150 inmates have final orders of removal already entered against them. *See* Ex. C ¶ 15.

One major category of rescinded detainers was for drug offenders. ICE has rescinded 54 such detainers. *See* Ex. C ¶ 13. The offenses included a range of drugs, including cocaine, methamphetamines, and marijuana, and a range of activity, from possession to manufacture and delivery. *See* Ex. C, Ex. 1. Defendants are not simply ignoring low-level drug offenses related to personal use. Six of the convictions for marijuana possession involved at least *fifty pounds* of the drug. *See id.* "None of these inmates were convicted of only a single offense involving possession for one's own use of 30 grams or less of marijuana and sentenced to TDCJ." Ex. C ¶ 13.

Rescinding detainer requests is not the only problem. Defendants are also failing to issue detainer requests in the first instance. *See id.* ¶ 16. As a result, criminal aliens for whom TDCJ would have received a detainer request during the Trump Administration had they already been in state custody will not be receiving a detainer request under the Biden Administration. *See id.*; Ex. I ¶ 8.

The story in Louisiana is similar. The Louisiana Department of Public Safety and Corrections ("LDP&C") has identified four individuals who should have been kept in mandatory federal detention but were not. *See* Ex. L. ICE cancelled a pending detainer on Jose Salazar, a Honduran national and a sex offender who was convicted

of violating La. R.S. 14:81, indecent behavior with juveniles, and La. R.S. 14:43.1, sexual battery. *See id.* ¶¶ 8–9. According to LDPS&C records, ICE informed the State that "ICE will not be taking the subject into custody" due to his health conditions after it determined "he is under total care for all life functions." *Id.* ¶ 10. "Louisiana advised that Salazar was not subject to supervision because he had served his full sentence, and that his only requirement would be to register as a sex offender. Instead of taking him into its own custody and control, ICE has left him a ward of the State 'until his death or recovery.'" *Id.*

Axel Reyes Amador was convicted of violating La. R.S. 40:967(C)(2), possession of a schedule II controlled dangerous substance (Fentanyl). *See id.* ¶ 12. ICE issued a detainer and initially took custody of Amador, but released him almost immediately. Instead of being removed from the United States, Amador remains in Louisiana, subject to the State's supervision by probation and parole. *See id.* ¶ 13.

Genaro Rojo was convicted of violating La. R.S. 14:34.7, aggravated second degree battery. He, like Amador, was initially taken into ICE custody and then immediately released. He is still in Louisiana, subject to State supervision by probation and parole. *See id.* ¶ 14. Similarly, Angel Mayorga Barrios, who was convicted of violating La. R.S. 14:37.4, aggravated assault with a firearm, was taken and then released by ICE. Still in Louisiana, Barrios is subject to supervision by LDPS&C probation and parole. *See id.* ¶ 15.

These shifts—both rescinding detainers and failing to issue them—are attributable "to the new 'enforcement priorities' established by [the January 20 and

February 18] memoranda," as ICE officials have acknowledged to TDCJ. Ex. C ¶ 17. And the change in ICE policy is categorical. ICE is not making individualized, case-by-case determinations. *See* Ex. D ¶¶ 28, 35. Instead, ICE is treating the "enforcement priorities" as hard-and-fast limits on who to detain. *See id.* The same dynamic will be seen by agents in dealing with the September 30 Memorandum. Ex. D ¶¶ 45–48.

The January 20 and February 18 Memoranda have radically reduced the number of "initial book-ins" resulting from ICE enforcement and removal operations. In FY2020, ICE was averaging about 10,000 initial book-ins per month, until the pandemic hit. *See* Ex. Q, Detention EOFY2020, ICE Initial Book-Ins by Arresting Agency and Month: EOFY2020. As ICE has previously explained, initial book-ins "began to decline sharply in April 2020, coinciding with changes resulting from the global pandemic." *See* Ex. N at 6. During the pandemic, ICE had between 5,000 and 7,000 initial book-ins per month. *See* Ex. Q, Detention EOFY2020, ICE Initial Book-Ins by Arresting Agency and Month: EOFY2020. This level of activity continued in FY2021. From October 2020 through January 2021, ICE continued to have between 5,000 and 7,000 initial book-ins per month. *See* Ex. R, Detention FY21 YTD, ICE Initial Book-Ins by Arresting Agency and Month: FY2021 YTD.

But after the January 20 and February 18 Memoranda took effect, initial book-ins plummeted. Since then, ICE initial book-ins have numbered only about 2,000 per month. *See* Ex. R, Detention FY21 YTD, ICE Initial Book-Ins by Arresting Agency and Month: FY2021 YTD (February: 1,985; March: 2,343; Part of April: 914).

This dramatic decrease in federal detention leaves many criminal aliens free. In FY2020, "approximately 90% of those aliens arrested by ICE had criminal convictions and/or pending charges." Ex. S at 5. There is simply no way for ICE to so significantly reduce its initial book-ins without allowing many dangerous criminal aliens at large in American communities.

Defendants' failure to detain criminal aliens is imposing significant costs on Plaintiffs and their citizens. In some cases, Defendants' refusal to take custody of criminal aliens leads to those aliens being released into local communities. *See, e.g.*, Ex. C, Ex. 1 (showing TDCJ inmates released on particular dates). If a criminal alien has completed his sentence, state or local authorities may not have authority to detain him, even though Congress mandated that federal immigration authorities do so. But the issue is not limited to TDCJ. Defendants' implementation applies also to criminal aliens held by the United States, other States, and local governments.

Criminal aliens in Texas and Louisiana, no matter where they were originally held, impose significant costs on the States. Consider the costs of crime. Recidivism was a major concern animating Congress's decision to make detention mandatory. *See Demore*, 538 U.S. at 518–19. It remains a problem today. Among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years.[1] When the Tarrant County Sheriff's Office recently analyzed inmates with immigration detainers, it found a recidivism rate of 73.68%. Ex. E ¶ 8. Indeed, ICE

[1] National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics; *see also* Ex. T.

itself acknowledges that detainers are useful for avoiding recidivism. *See* Ex. N at 17 ("The use of detainers . . . allows ICE ERO to assume custody of criminal aliens before they have an opportunity to reoffend."). And the problem is not limited by State borders. More than 15% of prisoners released in one State will be re-arrested in another State. *See* Ex. T at 4, Table 2.

That recidivism imposes significant costs on Texans, not only because of the irreparable harm resulting from criminal activity but also because of the significant financial cost of the criminal justice system. Texas spends large sums of money incarcerating criminal aliens. *See* Ex. F ¶ 6. In fact, Texas housed over 8,500 undocumented aliens in 2017–2018. *Id.* At a cost of $62.34 per alien per day, the cost to Texas totals about $150 million per year. *See id.* But the federal government reimburses only a fraction of that, less than 10% for 2017–2018. *See id.* ¶ 7. As one TDCJ official explained, "to the extent the number of aliens in TDCJ custody increases, TDCJ's unreimbursed expenses will increase as well." *Id.* ¶ 8. Similarly, States incur costs monitoring criminal aliens on probation or parole. *See* Ex. C ¶¶ 3, 18; Ex. L ¶¶ 18–19.

As the Supreme Court mandated in *Plyler v. Doe*, Texas provides public education to children of illegal aliens. 457 U.S. 202, 230 (1982). The annual cost of educating unaccompanied alien children—a subset of illegal aliens eligible for public education—costs Texas tens of millions of dollars per year. *See* Ex. H ¶ 4 (estimating costs of $31.32 million (FY 2016), $63.13 million (FY 2017), $53.05 million (FY 2018), $42.73 million (FY 2019), $112.10 million (FY 2020) and $26.71 million (FY 2021)).

The Associate Commissioner for School Finance/Chief School Finance Officer at the Texas Education Agency "anticipate[s] that the total costs to the State of providing public education to [unaccompanied alien children] will rise in the future to the extent that the number of [unaccompanied alien children] enrolled in the State's public school system increases." Ex. H ¶ 8.

In addition, Texas funds three healthcare programs that require significant expenditures to cover illegal aliens; the Emergency Medicaid Program, the Family Violence Program, and the Texas Children's Health Insurance Program. *See* Ex. G ¶ 9. Texas is required by federal law to include illegal aliens in its Emergency Medicaid Program. *See* 42 C.F.R. § 440.255(c). Between 2007 and 2019, Texas spent an estimated $62–$90 million annually on Medicaid services for illegal aliens, including an estimated $80 million dollars in SFY 2019. *See* Ex. G ¶ 9. Additionally, Texas spends over a million dollars per year providing services to illegal aliens though its Family Violence Program. Ex. G ¶ 10. Texas also spends millions of dollars per year on the Children's Health Insurance Program for perinatal coverage for illegal aliens, including an estimated $38 million dollars in 2013, and $6 million in 2019. *Id.* ¶ 11

Texas also incurs costs for uncompensated care provided by state public hospital districts to illegal aliens. Between 2006 and 2008, these estimated costs ranged from $597 million to $717 million. Ex. G ¶ 12. And these figures will only increase over time and with the reduction in detainer issuance. As the Chief Data and Analytics Officer at Texas's Health and Human Services Commission attested,

"the total costs to the State of providing such services and benefits to undocumented immigrants will continue to reflect trends to the extent that the number of undocumented immigrants residing in Texas increases or decreases each year." Ex. G ¶ 13.

Louisiana also faces increased healthcare expenses. To take one dramatic example, ICE's refusal to take custody of a criminal alien has left him a ward of the State. *See* Ex. L ¶ 10.

But even when criminal aliens are not released into society, Defendants' refusal to detain them imposes serious costs on States. In some circumstances, Texas has to detain criminal aliens to protect the public because Defendants refuse to do so. For example, when a criminal alien is considered for parole in Texas, the existence of a detainer is a relevant consideration. After the Biden Administration rescinded detainer requests for certain criminal aliens set to be released on parole, the Texas Board of Pardons and Paroles considered those new circumstances, and for more than twenty criminal aliens, concluded that parole was no longer appropriate. *See* Ex. C, Ex. 1 ("Vote withdrawn by BPP"); Ex. C ¶ 9 (explaining the process). Keeping such criminal aliens in custody, as opposed to paroling them to allow for prompt removal from the United States, is financially costly for Texas taxpayers. *See* Ex. F. ¶ 6. Even paroling these inmates increases costs to Texas relative to Defendants taking custody of them. Ex. C ¶18. But when the federal government fails to detain criminal aliens who need to be detained, Texas will incur those costs.

SUMMARY OF THE ARGUMENT

Defendants are violating the law and the September 30 Memorandum

continues this pattern. The INA requires Defendants to take custody of various criminal aliens when they are released from criminal custody. "The Attorney General *shall* take into custody any alien who" "is deportable" or "is inadmissible by reason of having committed" specified offenses, including drug crimes and crimes of moral turpitude, "when the alien is released." 8 U.S.C. § 1226(c)(1) (emphasis added). The INA also provides that Defendants "*shall* detain" aliens with final orders of removal "[d]uring the removal period," which begins upon their release from criminal custody. 8 U.S.C. § 1231(a)(2) (emphasis added).

But Defendants have disregarded Congress's commands. Instead, they have implemented arbitrary and capricious memoranda designed to prevent compliance with their non-discretionary duties. Defendants also issued these memoranda without going through the required notice-and-comment process.

This Court's analysis in its order preliminarily enjoining the January 20 and February 18 Memoranda is equally applicable to the September 30 Memorandum. The latter, like the former two, purports to give Defendants discretion to take into custody criminal aliens and aliens with final orders of removal whose detention Congress has mandated. Likewise, the September 30 Memorandum (like the prior two) purports to grant Defendants discretion to decline to take into custody aliens who would otherwise be mandatorily detained and will have similar effects. This analysis is the same in all pertinent respects: Standing, ECF No. 79 at 20–46; reviewability and whether the detention of aliens in those categories is mandatory or subject to executive discretion, *id*. at 47–105; the applicability of notice-and-comment

requirements, *id*. at 127–144; irreparable injury, *id*. at 144–146; and balance of the equities and scope of relief, *id*. at 147–156.

Nothing precludes this Court's review of Defendants' unlawful actions. Texas and Louisiana have standing because they face financial harm and because their citizens face an increased risk of crime from recidivist criminal aliens. The September 30 Memorandum is final agency action reviewable under the APA, but even if it were not, this Court would have the equitable authority to issue appropriate relief. And because the memorandum has yet to go into effect, the Court may postpone its effective date to evaluate its legality. 5 U.S.C. § 705. A postponement—or "stay"—will also allow the Court to reach a final judgment regarding the existing guidance set forth in the January 20 and February 18 Memoranda.

Plaintiffs' harms are irreparable, Defendants have no legitimate interest in enforcing unlawful memoranda, and the public interest requires enforcement of the INA and the APA. For these reasons, the Court should grant Plaintiffs' motion to postpone the effective date of the September 30 Memorandum or, in the alternative, preliminarily enjoin it.

ARGUMENT

I. The September 30 Memorandum violates the Administrative Procedure Act.

The September 30 Memorandum violates the Administrative Procedure Act because it: (1) violates a statutory command to take custody of dangerous criminal aliens; (2) violates a separate statutory command to take custody of aliens with final orders of removal, (3) was issued without reasoned decisionmaking; and (4) is a

substantive rule issued without notice-and-comment rulemaking. Any one of these grounds is independently sufficient to postpone the effective date of this unlawful agency action.

A. Defendants' failure to detain criminal aliens violates Section 1226(c).

Under the September 30 Memorandum, as under the January 20 and February 18 Memoranda, Defendants reject a statutory requirement to take dangerous criminal aliens into custody. By continuing to rescind detainer requests (or simply never issuing them) for aliens convicted of serious crimes, Defendants propose to continue violating a non-discretionary duty. The INA requires Defendants to take certain criminal aliens into custody.

1. The INA imposes a non-discretionary duty to detain dangerous criminal aliens.

In general, the INA gives the executive branch discretion regarding the detention of aliens. Section 1226(a) provides 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) (emphasis added). If the executive branch detains an alien under Section 1226(a), it also "may release the alien" under certain conditions. *Id.* § 1226(a)(2).

But the executive branch *must* detain aliens who have committed certain serious crimes. Section 1226(c) provides that "[t]he Attorney General *shall* take into custody any alien who" "is inadmissible" or "is inadmissible by reason of having committed" specified offenses "when the alien is released." 8 U.S.C. § 1226(c)(1)

(emphasis added).[2] "[T]he Secretary's obligation to" detain criminal aliens applies "as soon as covered aliens [are] released from criminal custody." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019).

And almost all such aliens must remain in custody. For criminal aliens detained under Section 1226(c), release is available "only if" (1) it is "necessary" for witness protection, (2) "the alien will not pose a danger to the safety of other persons or of property," and (3) the alien "is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(2). As a result, Section 1226(c) "mandates detention of certain criminal aliens during the removal proceedings and for the subsequent 90-day removal period." Z*advydas v. Davis*, 533 U.S. 678, 698 (2001).

Thus, Congress created a comprehensive scheme that—in some instances—explicitly limits executive discretion. While Section 1226(a) "gives the Secretary broad discretion as to" the detention of ordinary aliens, Section 1226(c)'s "job is to subtract some of that discretion when it comes to the arrest and release of criminal aliens." *Preap*, 139 S. Ct. at 966. "The Secretary *must* arrest those aliens guilty of a predicate offense." *Id.*; *see also Arizona v. United States*, 567 U.S. 387, 456–57 (2012) (Alito, J., concurring in part and dissenting in part) (describing Section 1226(c) as leaving "the Executive no discretion but to take the alien into custody" "[i]n many, if not most, cases involving aliens who are removable for having committed criminal offenses").

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[2] Congress later transferred this obligation to the Secretary of Homeland Security. *See* 6 U.S.C. § 251.

Courts routinely recognize this distinction. In *Jennings v. Rodriguez*, for example, the Supreme Court distinguished Section 1226(a)'s permissive "default rule" from Section 1226(c)'s mandatory requirements. 138 S. Ct. 830, 837–38 (2018). "Section 1226(a) creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 846. Section 1226(c), by contrast, "mandates detention." *Id.* It "obligates the Attorney General to 'take into custody' certain aliens." *Id.* at 849. And then "together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must continue 'pending a decision on whether the alien is to be removed from the United States.'" *Id.* at 846. Once that decision has been made, a criminal alien subject to a final order of removal remains in detention. *See* 8 U.S.C. § 1231(a)(2).

The Fifth Circuit agrees that Section 1226(c) not only authorizes detention but "mandates that the Attorney General take into custody aliens who are deportable for having committed certain crimes." *Nyabwa v. Dep't of Homeland Sec. Immig. & Customs Enf't Field Office Dir.*, 537 F. App'x 451 (5th Cir. 2013) (per curiam). Under Section 1226(c)(1) "the Attorney General is *required* to take aliens who have committed felonies into custody." *United States v. Garcia-Rodriguez*, 640 F.3d 129, 133 (5th Cir. 2011) (per curiam) (emphasis added).

Indeed, the executive branch itself has previously recognized the mandatory nature of 1226(c). *See In re Joseph*, 22 I.&N. Dec. 799, 802 (BIA 1999) ("The statute prescribes mandatory detention for certain aliens, including those who are deportable

by reason of having committed aggravated felonies."); Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27,441-01, 27,442, 1998 WL 248023 (May 19, 1998) (noting "a clear intention that aliens removable from the United States on the basis of a crime be detained, except in very limited circumstances"); Brief for the Pet'rs, *Reno v. Ma*, 2000 WL 1784982, at *27–28 (U.S. Nov. 24, 2000) (distinguishing Section 1226(c)'s "mandatory detention" language from provisions under which detention is "discretionary rather than mandatory").

Congress chose this approach because leaving the executive branch with discretion had proven unwise. "[I]n adopting § 1226(c), Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully." *Demore*, 538 U.S. at 528. And Congress considered previous criminal convictions "relevant to future dangerousness." *Id.* at 525 n.9 (citing *Zadvydas*, 533 U.S. at 714 (Kennedy, J., dissenting)). But prior executive officials had failed to properly detain such dangerous aliens. "Congress adopted [Section 1226(c)] against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 517–18. Addressing this problem required making Section 1226(c) mandatory.

Whether to restrict executive discretion through Section 1226(c) was Congress's decision to make. "It is undisputed that Congress may mandate that the

Executive Branch detain certain noncitizens during removal proceedings or before removal." *Preap*, 139 S. Ct. at 973 (Kavanaugh, J., concurring). Defendants cannot alter Congress's command by memorandum.

2. Defendants are failing to take custody of aliens covered by Section 1226(c).

Contrary to Section 1226(c), Defendants are refusing to take custody of aliens convicted of serious crimes and the September 30 Memorandum continues that dereliction. The statute unequivocally requires detention of aliens who commit drug offenses or crimes of moral turpitude. Yet Defendants have rescinded detainer requests for many such aliens in TDCJ custody. The September 30 Memorandum continues the policy of making detainers for such aliens discretionary, and further adds discretion to a mandatory detention category that the prior memoranda included as a priority: aliens convicted of aggravated felonies. 8 U.S.C. § 1227(a)(2)(A)(iii).

To begin, consider drug offenses. Section 1226(c)(1) refers to 8 U.S.C. § 1182(a)(2), which covers "any alien convicted of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." *Id.* § 1182(a)(2)(A)(i)(II); *see also id.* § 1226(c)(1)(B) (citing *id.* § 1227(a)(2)(B)). Despite this, Defendants have refused to take custody of numerous drug offenders. *See supra* Background Part III; Ex. C ¶ 13.

Additionally, Section 1226(c)(1) requires Defendants to detain aliens convicted of "a crime involving moral turpitude (other than a purely political offense)[.]" 8 U.S.C. § 1182(a)(2)(A)(i)(I), *See also id.* § 1226(c)(1)(B) (citing *id.* § 1227(a)(2)(A)).

"Crimes including dishonesty or lying as an essential element involve moral

turpitude." *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *see also Jordan v. De George*, 341 U.S. 223, 227 (1951) ("Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude."). But Defendants have refused to take custody of aliens convicted of impersonating a public servant, fraudulent use or possession of identification, tampering with government records, forging governmental financial instruments, and tampering with physical evidence. *See* Ex. C, Ex. 1.

Evading arrest with a vehicle is a crime of moral turpitude. *See Pulido-Alatorre v. Holder*, 381 F. App'x 355, 358–59 (5th Cir. 2010) (per curiam) (upholding INS's determination that "intentional flight with a vehicle" is a crime involving moral turpitude because of the "conscious disregard of a substantial and unjustifiable risk"). But despite the clear requirement of Section 1226(c)(1), Defendants have not only failed to detain but also rescinded detainer requests for at least eighteen aliens convicted of some form of evading arrest. *See* Ex. C, Ex. 1.

The Fifth Circuit "agree[s] with the BIA's conclusion that the failure to stop and render aid after being involved in an automobile accident is the type of base behavior that reflects moral turpitude." *Garcia-Maldonado v. Gonzales*, 491 F.3d 284, 290 (5th Cir. 2007). Yet, Defendants have dropped detainer requests for aliens who did just that. *See* Ex. C, Ex. 1 ("accident involving death").

Similarly, "the crime of theft is one involving moral turpitude." *Okoro v. INS*, 125 F.3d 920, 926 (5th Cir. 1997). But Defendants rescinded a detainer request for an alien convicted of stealing property worth thousands of dollars. *See* Ex. C, Ex. 1

("theft prop >=$2,500<$30k").

In light of this evidence, it is indisputable that Defendants are refusing to take custody of criminal aliens covered by Section 1226(c). And when Defendants do take custody of covered criminal aliens, they at least sometimes release those aliens, *see* Ex. L ¶¶ 13–15, despite the statutory prohibition on release, *see* 8 U.S.C. § 1226(c)(2).

3. Defendants are violating the APA.

"A reviewing court shall hold unlawful and set aside agency action . . . found to be . . . not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). As this Court found in preliminarily enjoining their enforcement, the January 20 and February 18 Memoranda violate the INA, making them substantively unlawful under the APA. ECF No. 79 at 105. The September 30 Memorandum is unlawful on the same grounds and should therefore be postponed from taking effect until its legality is determined on the merits.

Moreover, Defendants are unlawfully withholding or unreasonably delaying agency action. *See* 5 U.S.C. § 706(1). Taking custody of criminal aliens is "a *discrete* agency action that [Defendants are] *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Because Section 1226(c) "clearly reins in the agency's discretion," Defendants' failure to follow it triggers Section 706(1). *Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015). Just as a federal court can compel an agency to comply with a "statutory command that the Secretary 'shall' take action within 120 days," so could this Court compel Defendants to comply with the statutory command to take custody of criminal aliens. *Brock v. Pierce Cnty.*, 476 U.S. 253, 260 n.7 (1986).

B. Defendants' failure to detain aliens with final orders of removal violates Section 1231(a)(2).

Under the January 20 and February 18 Memoranda, Defendants have been refusing to take aliens with final orders of removal into custody. *See* Ex. C ¶ 15. By rescinding detainer requests (or simply refraining from issuing them) for aliens with final orders of removal, Defendants are violating a non-discretionary duty imposed by statute. The September 30 Memorandum does nothing to limit this abuse of purported executive discretion but empowers it further with its convoluted pre-enforcement requirements.

Section 1231(a)(2) provides that Defendants "shall detain" aliens "[d]uring the removal period." 8 U.S.C. § 1231(a)(2). For aliens in criminal custody with final orders of removal that have not been stayed by a court, the removal period begins on "the date the alien is released from detention or confinement." 8 U.S.C. § 1231(a)(1)(B).

Thus, Defendants are obligated to detain aliens with final orders of removal when they are released from TDCJ custody. But instead of detaining criminal aliens with final orders of removal, Defendants have *rescinded* detainer requests for at least 21 such aliens in TDCJ custody since the February 18 Memorandum. *See* Ex. C ¶ 15.

There is no doubt that this duty is non-discretionary. The Supreme Court has explained that "[a]fter entry of a final removal order and during the 90-day removal period, . . . aliens *must* be held in custody." *Zadvydas*, 533 U.S. at 683 (citing 8 U.S.C. § 1231(a)(2)) (emphasis added). This Court has previously recognized that Section 1231(a)(2) is mandatory and that Defendants do not have discretion to decline detention. ECF No. 79 at 61–85. Nor does the INA allow Defendants to delay

detention. "[T]he statute by its own language mandates immediate detention." *Lin v. United States*, 5:07-cv-26, 2007 WL 951618, at *3 (S.D. Tex. Mar. 28, 2007) (citing 8 U.S.C. § 1231(a)(2)).

Other courts agree that Section 1231(a)(2) is mandatory. *See, e.g.*, *Martinez v. Larose*, 968 F.3d 555, 560 (6th Cir. 2020) ("§ 1231(a)(2) provides for mandatory detention of the alien during the 90-day removal period."); *Rodney v. Mukasey*, 340 F. App'x 761, 764 (3d Cir. 2009) ("the Attorney General must detain" an alien "under Section 1231(a) and that such custody is "mandatory"); *Hernandez-Esquivel v. Castro*, No. 5:17-cv-564, 2018 WL 3097029, at *3 (W.D. Tex. June 22, 2018) ("Detention during the removal period here, in other words, is mandatory."); *Alafyouny v. Chertoff*, No. 3:06-cv-204, 2006 WL 1581959, at *9 (N.D. Tex. May 19, 2006) (under "Section 1231(a)(2) . . . the government has no discretion and must detain the alien without exception during the ninety-day removal period.").

Defendants' violation of Section 1231(a)(2) establishes a clear substantive violation of the APA. *See* 5 U.S.C. § 706(2)(A), (C). And Defendants' failure to take custody of aliens with final orders of removal represents "agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

C. The September 30 Memorandum is arbitrary and capricious.

The APA prohibits agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Federal administrative agencies are required to engage in reasoned decisionmaking. "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." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). "[W]hile the arbitrary and capricious standard of review is highly deferential, it is by no means a rubber stamp." *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985).

The September 30 Memorandum is arbitrary for multiple reasons. First, it failed to consider the risks of recidivism among criminal aliens who are not detained. ECF No. 79 at 116–119. Recidivism was a major concern animating Congress's decision to make detention mandatory, and criminal aliens pose serious recidivism problems. *See Demore*, 538 U.S. at 518–19. And ICE itself agrees that detainers are central to avoiding recidivism. *See* Ex. N at 17 ("detainers . . . allow[] ICE ERO to assume custody of criminal aliens before they have an opportunity to reoffend.").

Second, the September 30 Memorandum ignores the effects non-detention will have on future removal efforts. ECF No. 79 at 122. Congress found these considerations important enough to justify enacting mandates like Section 1226(c), but Defendants have disregarded them—both illegally and without justification. As the Supreme Court noted in *Demore*, "[p]rior to the enactment of § 1226(c), when the vast majority of deportable criminal aliens were not detained during their deportation proceedings, many filed frivolous appeals in order to delay their deportation." 538 U.S. at 530 n.14. Failing to detain criminal aliens will increase the number of "frivolous appeals" designed "to delay . . . deportation." *Id.* But the September 30 Memorandum provides no justification for incurring such costs.

Similarly, when Defendants release aliens into the United States, those aliens

often abscond. ECF No. 79 at 119-120. ICE operates an "Alternatives to Detention" program "for a small subset of eligible aliens" who "must be thoroughly vetted" to determine whether they are "likely to comply with the terms of the program." Ex. O at 11. But even with all of those safeguards in place, the "absconder rate" was 26.9% for family units and 12.3% for individuals in 2019. *Id.* The absconder rate was even worse in 2020: 39% for family units and 21% for individuals. Ex. N at 12. For criminal aliens, absconding is even more likely. *See* Ex. D ¶ 37.

Third, the September 30 Memorandum does not discuss the costs that it will impose on 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. Failing to discuss the impact on States is particularly egregious because DHS has previously acknowledged that Texas and Louisiana are "directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement." Ex. J § II; Ex. K § II. As discussed above, in this case, the costs to Texas and Louisiana are substantial. *See supra* Background Part III; *see also infra* Argument Parts IV.A, V.

Defendants have a "clear and obvious responsibility to consider the relevant factors," which in this case include Texas's and Louisiana's expenses and costs stemming from Defendants' policies. ECF No. 79 at 120–123. Failing to consider important aspects of a problem renders that policy arbitrary and capricious. *See Michigan v. EPA*, 576 U.S. 743, 750 (2015) ("[A]gency action is lawful only if it rests

'on a consideration of the relevant factors.'").

Perhaps because the September 30 Memorandum did not consider any of the issues listed above, it also did not consider more limited policies that would have retained congressionally mandated detention of criminal aliens and aliens with final orders of removal. The absence of aggravated felons is especially glaring because this category was included as a priority in the first two memoranda.

The Supreme Court recently held that a DHS immigration action was arbitrary and capricious because it was issued "'without any consideration whatsoever' of a [more limited] policy." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)). Here, the Memoranda "show[] no cognizance of this possibility." *Id.* at 1912 n.6.

Finally, what little explanation the September 30 Memorandum does provide cannot justify the policies chosen. The February 18 Memorandum explains the prioritization of aliens who have committed "aggravated felonies" as "track[ing] Congress's prioritization of aggravated felonies for immigration enforcement actions." Ex. B at 4 n.6. But that does not explain Defendants' choices. ECF No. 79 at 124–126. Although Congress prioritized aggravated felonies by mandating detention of aliens who have committed such crimes, *see* 8 U.S.C. § 1226(c)(1)(B) (citing 8 U.S.C. § 1227(a)(2)(A)(iii)), it did the same for drug offenses and crimes of moral turpitude, *see id.* § 1226(c)(1)(A) (citing *id.* § 1182(a)(2)(A)(i)), as well as aliens with final orders of removal, *see id.* § 1231(a)(2). Yet the September 30 Memorandum drops one

mandatory detention category from its priorities (aggravated felonies), while keeping another (terrorism; *see* 8 U.S.C. § 1182(a)(3(B)). Ex. X at 3. And it does so without explaining why it privileges one of Congress's designated categories for mandatory detention while shunting the others to the back of the line, nor explaining why it changed its position regarding the prioritization of aggravated felonies. This is not reasoned decisionmaking. ECF No. 79 at 124–126.

The very reason the September 30 Memorandum provides for prioritizing terrorism also supports prioritizing drug offenses, crimes of moral turpitude, aggravated felonies, and final orders of removal. These are all categories Congress has designated for mandatory detention. "Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action." *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 382 (5th Cir. 2018). DHS's priorities are "paradoxical" in a way that "signals arbitrary and capricious agency action." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1016 (5th Cir. 2019). And it provided no "'reasoned analysis' to justify the disparate treatment of regulated parties that seem similarly situated," that is, other aliens categorically subject to mandatory detention. *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018).

D. The September 30 Memorandum is procedurally invalid.

If Defendants wanted to issue the September 30 Memorandum, they were required to do so through notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b), (c). Because they did not, it should be "held unlawful and set aside" as issued "without observance of procedure required by law." *Id.* § 706(2)(D).

As were the January 20 and February 18 Memoranda, the September 30 Memorandum is a substantive or legislative rule subject to notice-and-comment rulemaking. The APA's exemption of "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from notice-and-comment procedures, *id.* § 553(b)(A), "must be narrowly construed." *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015).

"Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). "On the contrary, courts have long looked to the contents of the agency's action, not the agency's self-serving label, when deciding whether statutory notice and comment demands apply." *Id.* Courts must be "mindful but suspicious of the agency's own characterization." *Texas*, 809 F.3d at 171.

Substantive rules are those that (1) impose rights and obligations, and (2) do not leave the agency and its decisionmakers free to exercise discretion. ECF No. 79 at 131. "These factors are not treated like different elements of a cause of action, both of which must be proved; but instead a 'matter of judgment is involved in distinguishing between rules however discretionary in form, that effectively circumscribe administrative choice.'" *Texas v. United States*, 328 F. Supp. 3d 662, 731 (S.D. Tex. 2018) (citing *Am. Bus Ass'n v. United States,* 627 F.2d 525, 530 (D.C. Cir. 1980)).

Just as the January 20 and February 18 Memoranda did, ECF No. 79 at 134–38, the September 30 Memorandum strips federal officers of the ability to make

individualized determinations because, as a practical matter, officers in the field facing the Memorandum's pre-investigation requirements and after-the-fact evaluation will take a hands-off approach to enforcement against aliens who are not "priorities." Ex. D ¶¶ 45–48.

Moreover, even if the September 30 Memorandum left federal officers with meaningful discretion, it would still affect rights and obligations. By purporting to transform a mandatory duty into a discretionary choice, the Memorandum has substantive legal consequences. ECF No. 79 at 133. It also creates financial consequences for the States, *id.*, and affects the rights of aliens already in detention because it can make a nonpriority alien's removal "unlikely to be imminent and thus entitle [the alien] to release from detention." ECF No. 79 at 133–34. Failing to detain criminal aliens makes removal less likely, *see Demore*, 538 U.S. at 518, and any policy that alleviates individuals of any risk of deportation has a legal consequence.

The September 30 Memorandum is also not a "rule of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). It has a "significant impact" on DHS officials, on the States, and on the criminal aliens who would otherwise be detained. ECF No. 79 at 139–44.

It is further substantive because it affects the States' financial obligations to aliens who are not detained, ECF No. 79 at 141. It does not allow field officers discretion to enforce the immigration laws without onerous pre-investigative burdens. *Id.* at 141–42; Ex. D ¶¶ 45–48. It also changes the substantive standards by which DHS determines whether to detain certain aliens to a multi-factored totality-

of-the-circumstances test that requires investigation before any enforcement action. ECF No. 79 at 143.

II. Violating federal statutes is not taking care that the laws are faithfully executed.

The President and those who work for him in the Executive Branch are obligated to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The September 30 Memorandum violates that constitutional obligation.

As explained above, the September 30 Memorandum contradicts 8 U.S.C. § 1226(c) and 8 U.S.C. § 1231(a)(2). Preventing immigration officers from following statutory detention mandates, by definition, falls short of faithfully executing the laws. "The Executive Branch may not instruct its officers to enforce a statute in a manner contrary to the law itself." ECF No. 79 at 3 (citing *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014)). It is true that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton v. Specter*, 511 U.S. 462, 473 (1994). But while "[t]he *Dalton* Court made clear that not every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution, [it] by no means found that action in excess of statutory authority can *never* violate the Constitution or give rise to a constitutional claim." *Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 258 (S.D.N.Y. 2020) (quoting *Sierra Club v. Trump*, 929 F.3d 670, 696 (9th Cir. 2019)) (other internal citations and quotation marks omitted). Where a claim is not "that the President simply did not fully comply with a congressionally prescribed process, . . . [but is] that the President's actions affirmatively displaced a congressionally

mandate[], [it implicates] constitutional separation of powers concerns not present in *Dalton*, [and] are thus appropriately considered as constitutional claims subject to judicial review." *Make the Rd. N.Y.*, 475 F. Supp. 3d at 258–59. Plaintiffs' claim here is that the September 30 Memorandum constitutes a wholesale repudiation of Congress's commands in the INA.

Of course, the Court can address Defendants' violation of these statutory provisions under the APA, as discussed above. *See supra* Part I.A–B. And a violation of the Constitution is also a violation of the APA—indeed, the Take Care Clause provides an independent basis that the Memorandum is contrary to law. *See* 5 U.S.C. § 706. But even if the APA did not provide a cause of action in this case, Plaintiffs' constitutional claim under the Take Care Clause would independently present the same merits question.

Federal courts have long exercised the power to enjoin federal officers from violating the Constitution. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327–28 (2015) (discussing "a long history of judicial review of illegal executive action, tracing back to England"). Plaintiffs have a cause of action "at equity." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 475 (5th Cir. 2020) (en banc). "Equity thus provides the basis for relief—the cause of action, so to speak"—when a plaintiff seeks prospective relief for a constitutional violation committed by a federal official. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232 (10th Cir. 2005) (McConnell, J.). As a result, even if the Court concluded that the APA did not provide an avenue for review, it would not affect Plaintiffs' right to relief on their

constitutional claim. *See Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) (Section 701 "serves only to take away what the APA has otherwise given—namely, the APA's own guarantee of judicial review"—"not repeal the review of ultra vires actions that was recognized long before" the APA); *Simmat*, 413 F.3d at 1233 n.9 (allowing the plaintiff's constitutional claim to proceed even though he "appear[ed] to concede that his claim does not satisfy the APA's requirement of 'final agency action'").

III. No procedural issue prevents this Court's review.

Defendants cannot avoid this Court's review.

A. Texas and Louisiana Have Standing.

Defendants' violations of federal law cause concrete injuries. *See supra* Background Part III. The shift represented by September 30 Memorandum will increase the number of criminal aliens imposing costs on the States (as opposed to in federal custody or removed from the United States). *See* Exs. F, G, H, L. This increase in the number of criminal aliens will injure Plaintiffs in ways that this Court has already recognized: financial injuries due to detention costs, public education services, and healthcare costs; *parens patriae* injury due to injuries from criminal activity. ECF No. 79 at 20–46.

This Court has also recognized Texas's standing based on the costs of providing a federally mandated education to illegal aliens. S*ee* Ex. H ¶ 8. When Defendants fail to take custody of juvenile aliens set to be released by the Texas Juvenile Justice Department, those aliens who have not yet graduated attend Texas public schools. *See* Ex. I ¶¶ 7–8.

Texas is also financially injured through its funding of other public benefits and services, including healthcare. *See* Ex. G ¶ 13. For FY2019, Texas spent roughly $80 million from the Emergency Medicaid program, $1 million from the Family Violence Program, and $6 million from the Children's Health Insurance Program on illegal aliens. *See id.* ¶¶ 9–11. For this case, the Texas Health and Human Services Commission has provided recent estimates. *See* Ex. G ¶ 10, Ex. 2. HHSC's estimates are reliable (and indeed relied upon by the Texas Legislature, *see id.* ¶ 5), but even if they were significantly off, it would not affect Texas's standing. As long as Texas spends *some* money, it has established an injury in fact. "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).

Finally, the increase in criminal activity attributable to Defendants' failure to detain criminal aliens is an injury in fact. 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; *see also Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting) (discussing "statistical studies showing high recidivism rates for released aliens"). Indeed, that is why Congress mandated their detention. *See Demore*, 538 U.S. at 525 n.9 (noting that Congress considered previous criminal convictions "relevant to future dangerousness"). This injures Texas and Louisiana not only because of increased law-enforcement and detention costs but also as *parens patriae*. 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 Texas and Louisiana are "asserting rights under federal law rather than attempting to protect [their] citizens from the operation of federal statutes," they can bring *parens patriae* 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). And Texas and Louisiana are "owed special solicitude" because they "assert[] a congressionally bestowed procedural right and the government action at issue affects [their] 'quasi-sovereign' interests." ECF No. 79 at 45–46 (citing *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007)); *see also Texas*, 809 F.3d at 152–55.

B. The September 30 Memorandum is final agency action.

"Under the APA, an aggrieved party may file suit in a federal district court to obtain review of any final agency action for which there is no other adequate remedy in a court." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S.Ct. 617, 626 (2018) (citing 5 U.S.C. § 704). To be final, "[f]irst, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The September 30 Memorandum satisfies both conditions. First, it is the consummation of Defendants' decisionmaking process. *See* Ex. X at 6 ("This guidance

will become effective in sixty (60) days, on November 29, 2021") (emphasis added). There is no indication it is tentative and subject to reconsideration, and it instructs subordinates to take several preparatory actions before the effective date of November 29. *Id.* at 6 (requiring developing training, processes for reviewing implementation, data collection, and case review process); *see also id.* at 7 ("This guidance is Department-wide. Agency leaders as to whom this guidance is relevant to their operations will implement this guidance accordingly."). Second, it purports to alter not only Defendants' legal obligation to detain certain aliens—as already discussed—but also those aliens' rights. ECF No. 79 at 57–60. For example, Defendants now provide a "case review process" that allows aliens to request "expeditious review of the enforcement actions taken. Discretion to determine the disposition of the case will remain exclusively with the Department." Ex. X at 6.

C. The September 30 Memorandum is reviewable.

The September 30 Memorandum and Defendants' failure to take custody of criminal aliens are reviewable under the APA. *See* 5 U.S.C. § 701(a). "[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and [courts] will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.'" *Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993)). Accordingly, Defendants bear a "heavy burden." *Id.* Raising "substantial doubt" about reviewability is not enough to overcome "the general presumption favoring judicial review of administrative action." *Id.*

No "statutes preclude judicial review" under 5 U.S.C. § 701(a)(1). This Court

has already examined the specific statutory bars to review invoked by Defendants, and that analysis is the same as to this similar agency action. See ECF No. 79 at 47–53.

Defendants have relied on 8 U.S.C. § 1252(g), but that provision does not apply because this case is not brought "by or on behalf of any alien." 8 U.S.C. § 1252(g). Nor does this case "aris[e] from" a "decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. § 1252(g). On the contrary, it arises from Defendants' failure to take custody of criminal aliens.

Nor does Section 1226(e) bar this suit. First, that "limitation applies only to 'discretionary' decisions about the 'application' of § 1226 to particular cases." *Preap*, 139 S. Ct. at 962 (plurality op.). Section 1226(e) "does not block lawsuits over 'the extent of the Government's detention authority under the "statutory framework" as a whole.'" *Id.* (quoting *Jennings*, 138 S. Ct. at 841); *see also Demore*, 538 U.S. at 516–17; *Oyelude v. Chertoff*, 125 F. App'x 543, 546 (5th Cir. 2005). Here, Plaintiffs challenge Defendants' claimed authority to decline detention of covered criminal aliens. "Because the extent of the Government's detention authority is not a matter of 'discretionary judgment,' 'action,' or 'decision,'" this case "falls outside of the scope of § 1226(e)." *Jennings*, 138 S. Ct. at 841. Second, this case is not about "the detention . . . of any alien." 8 U.S.C. § 1226(e). It is about unlawful policies regarding the detention of aliens generally. *See Preap*, 139 S. Ct. at 962 (contrasting "the 'application' of § 1226 to particular cases" with "the general extent of the Government's authority under § 1226(c)"). In any event, even if Section 1226(e) did

apply, it would bar only claims under Section 1226, not Plaintiffs' other claims.

Refusing to comply with non-discretionary statutory duties is not "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This Court has already analyzed this aspect in detail as well. ECF No. 79 at 61–103. "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).

All of Plaintiffs' claims are reviewable for the reasons explained above. But even if Section 701(a)(2) barred certain claims, it would not preclude the Court from considering Counts IV (based on a lack of notice-and-comment rulemaking), and V (based on the Take Care Clause). Plaintiffs' claims based on the Constitution are properly before the Court even without the APA, so Section 701 is not an obstacle. And Plaintiffs' argument that Defendants were "required to abide by the familiar notice-and-comment rulemaking provisions of the APA" presents a procedural claim "quite apart from the matter of substantive reviewability." *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993) (considering whether the agency should have used notice-and-comment rulemaking after holding that the substance of the agency's decision was discretionary and unreviewable).

IV. Texas and Louisiana will suffer irreparable harm if the September 30 Memorandum were to become effective.

Texas and Louisiana face irreparable injuries. "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. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, "[t]he plaintiff need show only a significant threat of injury from the

impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Id.* (footnote omitted).

A. Plaintiffs will incur financial costs they cannot recover.

Defendants are forcing Texas and Louisiana to expend additional resources on criminal aliens, as explained above. *See supra* Part IV.A. That injury is irreparable because Texas and Louisiana cannot recover those costs from the federal government. ECF No. 79 at 144–146; *Texas*, 328 F. Supp. 3d at 737 (the State's financial injury was irreparable because "there is no source of recompense").

B. Increased criminal activity is an irreparable injury.

In addition, the increased criminal activity caused by Defendants' unlawful actions under the September 30 Memorandum will be irreparable. Violations of state law are irreparable injuries to the State's sovereign interest in "creat[ing] and enforc[ing] a legal code." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601. That is why "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Criminal activity also causes irreparable harm to the well-being of Texas and Louisiana citizens. ECF No. 79 at 146.

C. DHS admits Texas and Louisiana face irreparable injury.

DHS has already acknowledged that policies like those in the January 20 and February 18 Memoranda cause Texas and Louisiana significant harm. "Texas, like other States, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can impact Texas's law enforcement, housing, education, employment,

commerce, and healthcare needs and budgets." Ex. J § II. DHS admitted the same was true for Louisiana. Ex. K § II. Indeed, DHS has specifically admitted that "a decrease or pause on apprehensions or administrative arrests" would "result in concrete injuries to Texas." Ex. J § II(3). Again, the same is true for Louisiana. *See* Ex. K § II(3).

Texas and Louisiana face particular harm because the rushed implementation of the September 30 Memorandum deprives them of the ability to adjust their policies in light of the federal shift. As DHS itself has acknowledged, "[t]he harm to Texas is particularly acute where its budget has been set months or years in advance and it has no time to adjust its budget to respond to DHS policy changes." Ex. J § II; *see also* Ex. K § II (same for Louisiana).

V. Postponing the effective date of, or preliminarily enjoining, the September 30 Memorandum would not harm Defendants or the public.

Defendants face no harm from the postponement of the effective date of, or preliminary injunction of, the September 30 Memorandum. They have no legitimate interest in the implementation of unlawful memoranda. *See League of Women Voters of U.S. 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"). But even if Defendants had a legitimate interest in the September 30 Memorandum, they face no substantial prejudice from a delayed implementation. DHS has already recognized that any costs from delaying new policies is outweighed by the benefits of consultation and more

reasoned decisionmaking. *See* Ex. J § II; Ex. K § II.

Further, the public interest strongly favors Plaintiffs. "'[T]he public is served when the law is followed,' and the public will be served if the Executive Branch is enjoined from implementing and enforcing a policy that instructs officials to violate a congressional command." ECF No. 79 at 150 (quoting *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013)). And "[t]he public interest is 'always' served by the execution of removal orders." *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 436 (2009)).

And the Fifth Circuit has specifically recognized that the agreements DHS made with the States are a relevant factor in determining the public interest factor, even where they are not being enforced themselves. *See Texas v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021).

CONCLUSION

The State of Texas and the State of Louisiana respectfully request that the Court postpone the effective date of the September 30 Memorandum to allow review on the merits or, in the alternative, preliminarily enjoin Defendants from implementing the September 30 Memorandum nationwide.

Date: October 22, 2021

Respectfully submitted.

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CERTIFICATE OF WORD COUNT

I certify that the total number of words in this document, exclusive of those sections designated for omission, is 13,034 as registered by Microsoft Word.

/s/Ryan D. Walters
RYAN D. WALTERS

CERTIFICATE OF CONFERENCE

I certify that on October 22, 2021, I conferred with counsel for Defendants, who represented that Defendants are opposed to this motion.

/s/Ryan D. Walters
RYAN D. WALTERS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on October 22, 2021, which automatically serves all counsel of record who are registered to receive notices in this case.

/s/Ryan D. Walters
RYAN D. WALTERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS; STATE OF LOUISIANA, *Plaintiffs*, v. The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendants*.	Civ. Action No. 6:21-cv-00016

ORDER

Pending before the Court is Plaintiffs' Motion to Postpone the Effective Date of Agency Action or, in the Alternative, for Preliminary Injunction. After reviewing the Motion, the Response, the Reply, the record, and the applicable law, the Court GRANTS Plaintiffs' Motion to Postpone the Effective Date of Agency Action or, in the Alternative, for Preliminary Injunction.

It is SO ORDERED.

Signed this ___ of ________________, 2021.

____
DREW B. TIPTON
UNITED STATES DISTRICT JUDGE